

***United States Court of Appeals
for the Second Circuit***



APPENDIX

Orig. w/ Affidavit of M. Silberg

75-1118

BPD.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1118

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK COTRONI and FRANK DASTI,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

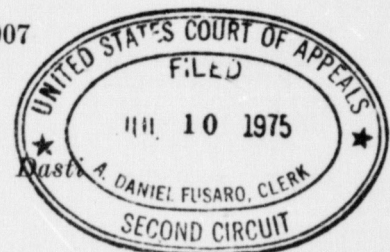
APPELLEE'S APPENDIX

(Volume V — Pages A-2801 to A-2914)

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**REGINA v. DEMETER, 19 C.C.C. (2d) 321 (ONTARIO HIGH COURT
OF JUSTICE; JANUARY 9, 1975)**

REGINA v. DEMETER 321

REGINA v. DEMETER

Ontario High Court of Justice, Grant, J. January 9, 1975.

Evidence — Admissibility — Wiretapping — Accused's communications intercepted prior to Criminal Code amendment limiting admissibility — Trial held after amendment — Interception unlawful under amendments although lawful at time made — "Lawful" interceptions alone admissible under amendment — Whether "lawful" referring only to procedure under amendments or state of law when interception made — Whether interception admissible — Cr. Code, ss. 178.11, 178.16.

Evidence — Admissibility — Wiretapping — Accused's communications with third party intercepted — Criminal Code providing for admissibility against "originator or [recipient]" if "originator or [recipient] consents" — Third party testifying for Crown and consenting to admission of evidence at accused's trial — Whether interceptions admissible — Whether only party charged may consent — Cr. Code, s. 178.16.

Statutes — Retrospective operation — Section creating offence — Whether section operates prospectively only — Cr. Code, s. 178.11.

Statutes — Retrospective operation — Evidence gathered prior to coming into force of Criminal Code amendment — Amendment limiting admissibility of evidence — Whether amendment to be given retrospective effect — Whether applicable to evidence gathered prior to amendment — Cr. Code, s. 178.16.

At the accused's trial on a charge of the murder of his wife the Crown sought to introduce tape recordings of conversations between the accused and S. The recordings were obtained through electronic surveillance of three types: (1) the wiretapping of the accused's telephone; (2) the recording of telephone conversations by use of an induction coil attached to S's telephone, and (3) the use of a "body pack" transmitter carried on the person of S. The wiretap on accused's telephone was kept on for approximately six months and had been approved by the Deputy Chief of Police to whom authority had been delegated by the Chief of Police who had in turn been given authority by the Board of Commissioners to authorize "wiretaps" in certain circumstances. In the case of the "induction coil" method and the "body pack" method, S, who testified at accused's trial, consented to their use at the trial. All the tape recordings were made before the date of the coming into force of the amendments to the *Criminal Code*, ss. 178.1 to 178.23 (enacted 1973-74, c. 50, s. 2) pertaining to the interception and admissibility of private communications, but the trial was held after this date. On a *voir dire* to determine the admissibility of this evidence, *held*, all the tape recordings were admissible. Since s. 178.11 of the *Criminal Code* creates an offence of unlawful interception of communications, it operates prospectively only. Section 178.16(1), which excludes evidence of private communications from being admitted "against the originator ... or the person intended by [him] to receive it ..." unless "(a) the interception was lawfully made; or (b) the originator ... or the person intended by the originator thereof to receive it has expressly consented to the admission ...", is a matter of evidence, procedural in nature, and therefore operates retrospectively. Since s. 178.11 does not render unlawful interceptions made before the

amendments came into force, the word "lawful" in s. 178.16(1) (a) must be interpreted to mean lawful at the time the interception was made. This depends on the circumstances and purpose which brought about the interception at the time, and as the police were acting within their authority and duty the interception was lawfully made. Further, the evidence of conversations between S and the accused was admissible under s. 178.16(1) (b) as S consented to its admission. Section 178.16(1) (b) is unambiguous and does not require that it be read as if it included the word "respectively" after "the originator" or "the person intended . . . to receive it", so that the evidence of the private communication would only be admissible if the person at whose trial the evidence was sought to be admitted consented to its admission.

[*Re Copeland and Adamson et al.*, [1972] 3 O.R. 248, 7 C.C.C. (2d) 393, 28 D.L.R. (3d) 26, apld; *U.S. v. American Radiator and Standard Sanitary Corp.* (1968), 288 F. Supp. 701, distd; *Eddy Match Co. Ltd. et al. v. The Queen* (1953), 109 C.C.C. 1, 20 C.P.R. 107, 18 C.R. 357; *Re Wicks and Armstrong* (1928), 61 O.L.R. 667, 49 C.C.C. 281, [1928] 2 D.L.R. 210; *R. v. Black et al.*, [1970] 4 C.C.C. 251, 10 C.R.N.S. 17, 72 W.W.R. 407; *R. v. Foll* (1956), 117 C.C.C. 19, 25 C.R. 69, 64 Man. R. 198; vard 118 C.C.C. 43, 26 C.R. 68, 21 W.W.R. 481, 65 Man. R. 67; *R. v. Steinberg*, [1967] 1 O.R. 733, [1967] 3 C.C.C. 48, reld to]

Evidence — Admissibility — Tape recording — Whether some evidence of accuracy and authenticity of recordings sufficient for admissibility — Whether intelligibility, inaudibility or fact of irrelevant or prejudicial portions affects admissibility — Cr. Code, s. 178.16.

Tape recordings are admissible once the trial Judge on a *voir dire* satisfies himself that there is some evidence upon which the jury could find they are accurate and authentic reproductions of the conversations allegedly recorded and that they will assist the jury and not mislead them. Any inadequacies in the audibility or intelligibility of the tape recordings or in the translations goes to the weight which the jury should attach to the evidence rather than to admissibility. Similarly, irrelevant and prejudicial portions could be edited out without affecting the admissibility of the remaining portion.

[*R. v. Magsud Ali*, [1965] 2 All E.R. 464, apld; *R. v. Foll* (1956), 117 C.C.C. 19, 25 C.R. 69, 19 W.W.R. 661, 64 Man.R. 198; vard 118 C.C.C. 43, 26 C.R. 68, 21 W.W.R. 481, 65 Man.R. 67; *Colpitts v. The Queen*, [1965] S.C.R. 739, [1966] 1 C.C.C. 146, 52 D.L.R. (2d) 416, 47 C.R. 175; *Warren, Gzowski & Co. v. Forst & Co.* (1911), 24 O.L.R. 282; affd 46 S.C.R. 642, 8 D.L.R. 641; *R. v. Wray*, [1971] S.C.R. 272, [1970] 4 C.C.C. 1, 11 D.L.R. (3d) 673, 11 C.R.N.S. 235; *R. v. Wray (No. 2)*, [1971] 3 O.R. 843, 4 C.C.C. (2d) 378 [affd [1974] S.C.R. 565, 10 C.C.C. (2d) 215, 33 D.L.R. (3d) 750]; *R. v. Glynn*, [1972] 1 O.R. 403, 5 C.C.C. (2d) 364, 15 C.R.N.S. 343, reld to]

Evidence — Privilege — Solicitor and client communications — Whether communication constituting unlawful act not made in contemplation of seeking legal advice privileged — Whether privilege destroyed by subsequent disclosure to third person.

No solicitor-client privilege attaches to a communication between an accused and his lawyer which involves an attempt by accused to mislead the police, since this constitutes an offence and it cannot be said the accused was seeking legal advice in the course of this conversation.

Furthermore, an accused destroys any privilege which might have attached when he discloses the contents of this conversation to a third party, namely, the police, in the course of carrying out his attempt.

RULING as to the admissibility of wiretap evidence during the course of the trial of the accused on a charge of non-capital murder.

(411) 7-1-5100
*F. J. Greenwood, Q.C., and L. J. McGuigan, for the Crown.
J. B. Pomerant, Q.C., and E. L. Greenspan, for accused.*

GRANT, J.:—In this case, on a charge of non-capital murder, the prosecution attempted to introduce into evidence certain tape recordings purporting to reproduce conversations that took place between the accused and various other persons. I admitted the same as evidence, indicating I would give written reasons later for so doing. There were three methods of electronic surveillance used by the investigating police officers, two of which involved overhearing and recording telephone conversations, and the other of which involved overhearing face-to-face conversations between the accused and another party by means of a transmitter placed on the body of the second party.

The first method with which I shall deal is that conducted by means of a device called a hard wire direct hook-up with a tape recorder and a line automatic. Wires were hooked to an overhead telephone line leading to Demeter's telephone at a location about three-quarters of a mile from his residence. From there, the wires were fed to a device inside the home of a person who was a member of the investigating police force. There, the wires connected to a line automatic which, in turn, connected to a tape recorder which operated on A.C. current and was powered by plugging it into an ordinary electrical outlet. The line automatic was a device which caused the recorder to start to operate whenever the telephone was used for either incoming or outgoing calls. The basis for its operation is the fact that the voltage in the line is different when a telephone is in use than when it is not. As long as this apparatus was operating properly, every conversation which took place over the telephone of Demeter was recorded automatically. The device was installed at approximately 7 p.m. on July 19, 1973, and remained there until it was removed on January 14, 1974. I shall refer to the above method of electronic surveillance as telephone interception.

Precautions were taken to ensure the accuracy of, and to preserve, the tape recordings. Through a test, Detective Terak, the investigating police officer in charge of electronic

surveillance, was able, by telephoning a certain number, to verify that the officers who had connected the wires to the overhead line had tapped the right telephone, namely, that of Demeter. New tapes, which came in sealed containers, were always used. The tape recorder was one which would erase any material previously on the tape as it recorded new material, in the event that on any occasion a tape was being reused. The receiving and recording apparatus was kept in a locked container, to which only Detective Terdik and two other officers had keys. The police officer in whose house the apparatus was installed, testified that, to his knowledge, this container was never tampered with. On each occasion that the tapes were changed, Detective Terdik was there and checked that the suitcase containing the apparatus was locked when he arrived and that the plug was in, and noted the times when each tape was put on and taken off. The police officer in whose home the apparatus was installed, testified that, to his knowledge, the plug was always in, that the outlet was always working, and that there were no electrical power failures during the time in question. On some of the occasions when he came to change the tapes, Detective Terdik would check the recorder to ensure that it was operating; this was done by pulling a certain plug on it which would activate it if it were in proper working order. After the tapes were removed they remained in Detective Terdik's possession. He kept them in a locked steel cabinet in his office. Even when the tapes were taken to be tested or processed, Detective Terdik or another police officer under his direction would always be with them.

The second method for overhearing telephone conversations involved the use of a portable, battery operated cassette tape recorder. A wire connection ran from this device to an induction coil which was attached to a suction cup. This suction cup was then applied to the earpiece of the telephone over which the conversation was taking place. The recorder was operated manually; that is, when a recording was desired, the cassette recorder was turned on. Thus, the person at the telephone to which the suction cup was attached could record any conversation he had on that telephone between himself and any other person. Again, precautions were taken to ensure the accuracy of, and to preserve, the tape recordings. The police officer investigating would test the equipment by applying the suction cup, turning on the recorder and making a telephone call to his own home. A new cassette tape was always used in this method. The new tape was tested at intervals to determine whether the tape was clear. After the desired

tape recordings were made, the tapes were kept in the possession or control of Detective Terdik. I shall hereinafter refer to this method of electronic surveillance as telephone recording.

The other method of such surveillance involved the use of body packs. To implement this method, a unit consisting of a 15-volt battery pack and transmitter to which was attached a microphone and an aerial, was used. This unit was placed underneath the clothing of an individual. The microphone was taped to his chest, the aerial was run down his leg, and the battery pack and transmitter were tied around or taped to his waist. The apparatus by which the messages were received and recorded was located in a surveillance van, especially equipped with, among other things, one-way glass in the back windows so that the police inside the vehicle could see out but no one outside the vehicle could see into the van. The method would be tested just prior to making the actual desired recording by having the person who was wearing the body pack speak into the microphone at a distance away from the surveillance van. The testing was done by the use of an old tape. Then a new tape would be taken out of a sealed package and put on the tape recorder. The receiver would be battery operated. With this method of surveillance, as with the method of wiretapping using the portable cassette recorder and suction cup induction coil, the operator of the receiving unit was able to hear the conversation at the same time that it was being taped. Again, as with the tapes obtained from the two methods previously mentioned, the tape recordings were kept in the custody or control of Detective Terdik or another member of the Mississauga Police Force at all times. When use was made of the induction coil device and the body packs, the tape would be played back later in the presence of Detective Terdik and Szilagyi who would verify that the tapes accurately recorded the conversations. I shall refer to this method as body packs.

The first objection by defence counsel to the admission of all such forms of electronic surveillance is that they are excluded by what was known as the *Protection of Privacy Act*, 1973-74 (Can.), c. 50, but the provisions of which are now included in the *Criminal Code* of Canada starting at s. 178.1 thereof and continuing to s. 178.23 [enacted *ibid.*, s. 2]. The sections or parts thereof which are particularly relevant to this problem are as follows:

178.1 In this Part,

"intercept" includes listen to, record or acquire a communication or acquire the substance, meaning or purport thereof;

"private communication" means any oral communication or any telecommunication made under circumstances in which it is reasonable for the originator thereof to expect that it will not be intercepted by any person other than the person intended by the originator thereof to receive it;

178.11(1) Every one who, by means of an electromagnetic, acoustic, mechanical or other device, wilfully intercepts a private communication is guilty of an indictable offence and liable to imprisonment for five years.

(2) Subsection (1) does not apply to

- (a) a person who has the consent to intercept, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it;
- (b) a person who intercepts a private communication in accordance with an authorization or any person who in good faith aids in any way a person whom he has reasonable and probable grounds to believe is acting with any such authorization;

(3) Where a private communication is originated by more than one person or is intended by the originator thereof to be received by more than one person, a consent to the interception thereof by any one of such persons is sufficient for the purposes of paragraph (2) (a), subsection 178.16(1) and subsection 178.2(1).

178.16(1) A private communication that has been intercepted and evidence obtained directly or indirectly as a result of information acquired by interception of a private communication are both inadmissible as evidence against the originator thereof or the person intended by the originator thereof to receive it unless

- (a) the interception was lawfully made; or
- (b) the originator of the private communication or the person intended by the originator thereof to receive it has expressly consented to the admission thereof.

(2) Where in any proceedings the judge is of the opinion that any private communication or any other evidence that is inadmissible pursuant to subsection (1)

- (a) is relevant, and
- (b) is inadmissible by reason only of a defect of form or an irregularity in procedure, not being a substantive defect or irregularity, in the application for or the giving of the authorization under which such private communication was intercepted or by means of which such evidence was obtained, or
- (c) that, in the case of evidence, other than the private communication itself, to exclude it as evidence may result in justice not being done,

he may, notwithstanding subsection (1), admit such private communication or evidence as evidence in such proceedings.

(3) Subsection (1) applies to all criminal proceedings, and to all civil proceedings and other matters whatever respecting which the Parliament of Canada has jurisdiction.

(4) A private communication that has been lawfully intercepted shall not be received in evidence unless the party intended to adduce it has given to the accused reasonable notice of his intention together with

(a) a transcript of the private communication, where it will be adduced in the form of a recording, or a statement setting forth full particulars of the private communication, where evidence of the private communication will be given *viva voce*; and

(b) a statement respecting the time, place and date of the private communication and the parties thereto, if known.

(5) Any information obtained by an interception that, but for the interception would have been privileged, remains privileged and inadmissible as evidence without the consent of the person enjoying the privilege.

It should be noted that an infraction of s. 178.11 creates a criminal offence, while s. 178.16 deals with the admissibility of evidence obtained by electronic interception. In R. v. Le-Sarge, an unreported decision of His Honour Judge Martin of the County Court for the Judicial District of York, dated September 23, 1974, it was held that in determining whether an interception was "lawfully made" within the meaning of s. 178.16(1) (a) regard must be had only to the provisions of such Act. Mr. Justice Claude Bisson of the Court of Queen's Bench (Crown Side) of the District of Montreal, came to a similar decision in an unreported judgment dated October 18, 1974, delivered in the case of R. v. Desjardins et al. I agree that the interception of any private communication can only be lawfully made after June 30, 1974, by complying with the methods provided by such amendments.

However, it is my opinion that other considerations are applicable when the interception was completed prior to such date and the same are sought to be admitted as evidence in a criminal trial after the date such Act came into force. While I have admitted as evidence the contents of the interceptions in this case, I am actuated by reasons different from those given in the above two decisions. It is my opinion that s. 178.11(1) should be regarded as perspective, not to be construed as retrospective. By s. 178.16 Parliament declared that thereafter private communications which had been intercepted within the meaning of the statute, except those excepted in paras. (a) and (b), should not be admitted in evidence in any criminal proceedings or other matters whatsoever respecting which the Parliament of Canada had jurisdiction. It was a prohibition directed entirely towards the use of this type of evidence and was therefore procedural in its nature and retrospective. Enactments which deal with the admissibility of

evidence are considered to be in the nature of procedure: *Eddy Match Co. Ltd. et al. v. The Queen* (1953), 109 C.C.C. 1, 20 C.P.R. 107, 18 C.R. 357. In *Re Wicks and Armstrong* (1928), 61 O.L.R. 667, 49 C.C.C. 281, [1928] 2 D.L.R. 210 (Ont. S.C.A.D.), Grant, J.A., refers to *Gardner v. Lucas* (1878), 3 App.Cas. 582 at p. 603, where Lord Blackburn said:

Then, again, I think that where alterations are made in matters of evidence, certainly upon the reason of the thing, and I think upon the authorities also, those are retrospective, whether civil or criminal.

Counsel have referred me to an American case, *U.S. v. American Radiator and Standard Sanitary Corp.* (1968), 288 F. Supp. 701, which dealt with the issue of whether or not certain legislation, which directed that the contents of any wire or oral communication which had been intercepted should not be received in evidence at any time if a disclosure of that information would be "in violation of this chapter". In holding the legislation not to be retrospective, the Court emphasized the words "in violation of this chapter" and held that to interpret that section as being retrospective, when the chapter in question did not exist before the enactment came into force, would be absurd, and at p. 707 it is said:

In accordance with the strictness and specificity of its formula, it provides for the future conduct of those who would use wiretapping and electronic surveillance, and it plainly indicates in 2515 that if one does not use it in accordance with the formula contained in this chapter, such matter is inadmissible in evidence at the trial of a case. But it is absurd to say that the formula could be made retrospective, and that no evidence obtained in the past, before the enactment, could be admissible in evidence. Certainly no one could have contemplated the formula in 1962 through 1966. The law frowns on an absurd interpretation of a statute. *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F. 2d 479, C.A. 3, 1965; *American Dredging Co. v. Local 25, Marine Division et al.*, 338 F. 2d 837, C.A. 3, 1964.

Section 178.11 does not have the effect of rendering unlawful any interception which, prior to the coming into force of the Act, was lawful. Section 178.16(1)(a) creates an exception to the main section and states that an interception that was lawfully made is not to be rendered inadmissible in evidence. Parliament has by this Act recognized the right and duty of law enforcement officers to use the assistance of electronic surveillance in those cases where it would be in the best interests of the administration of justice to do so and where other investigative procedures have been tried and failed or are unlikely to succeed and that urgency in the matter exists. It has not only recognized such right but it has set up ma-

chinery to supervise the same by the sections of the Act which provide for authorization thereof. Before the Act came into force it was the practice of Boards of Police Commissioners to authorize the Chief of Police or someone under his authority to decide when use might be made of such type of surveillance in proper cases. Now, under the Act, the authority to permit interception in such cases is vested in those Judges described by the Act, who have the power to so authorize police officers only on the terms and conditions set out in such Act. If Parliament meant that those interceptions which had been legally so authorized before the Act came into force were to be treated as illegal and the evidence obtained thereby to be inadmissible, it could readily have accomplished that result by adding appropriate words to that effect. One cannot think that it was the intention of Parliament to exclude as inadmissible any evidence lawfully obtained prior to June 30th and which would have been admissible if the case had been called for trial before that date. The authority which now exists under the Act permitting Judges to grant such authorization did not exist before June 30, 1974. It is my opinion that Parliament meant that the words "was lawfully made" were to be interpreted in such a way that if the interception was made prior to the Act coming into force, then the evidence obtained thereby was not to be excluded if the interception was lawfully made in accordance with the law as it stood at the time of such interception. This would appear to be the plain and natural meaning of the words so used in the statute. The statute does not have the effect of rendering unlawful the interceptions made in 1973 if there was no illegality attached to the same at the time they were made. One must look at the circumstances and purpose which brought about the interceptions at that time to judge as to the legality thereof at the time they were made. Section 178.16(3) provides that s.s. (1) of such section applies to all criminal proceedings. Therefore, the section was meant to govern criminal cases commenced before June 30, 1974. This lends some weight to the interpretation I have given the section; otherwise, such an interception could never be lawfully made before the effective date of the statute.

Counsel for the accused argued against the admission into evidence of the tape recordings made in any of such three methods on the ground, *inter alia*, that the interceptions were not lawful by reason of the fact that none of them came within the bounds of the decision in *Re Copeland and Adamson et al.*, [1972] 3 O.R. 248, 7 C.C.C. (2d) 393, 28 D.L.R. (3d) 26. The evidence of D. K. Burrows, Chief of Police of the

Mississauga Police Force, as it was named at the time that the wiretapping began, was that the Board of Commissioners for his police force gave him authority to do what he felt was necessary in serious criminal offences. He testified that it was part of his over-all authority and responsibility to delegate authority when he deemed it to be necessary. In the latter part of April, 1973, in accordance with authority from such Board of Police Commissioners, he delegated authority to Superintendent Teggart to authorize wiretaps if a serious criminal offence had been committed or was about to be committed and there were reasonable and probable grounds to believe that such procedure would assist in the investigation. Thus, both Chief Burrows and Superintendent Teggart had the authority to authorize wiretaps and before the wiretap was actually installed Superintendent Teggart discussed the matter with Chief Burrows.

There can be no doubt in this case but that a brutal murder had been committed and the Mississauga Police Force was under duty to investigate all areas which might yield evidence as to the guilty party. The investigation revealed they had all reasonable and probable grounds for believing that they would secure valuable information as to the crime by exercising electronic surveillance on the telephone in Demeter's home. They were therefore acting within their authority and duty and such interception was lawfully made: *R. v. Black et al.*, [1970] 4 C.C.C. 251, 10 C.R.N.S. 17, 72 W.W.R. 407; *R. v. Foll* (1957), 118 C.C.C. 43, 26 C.R. 68, 21 W.W.R. 481; *R. v. Steinberg*, [1967] 1 O.R. 733, [1967] 3 C.C.C. 48.

I therefore ruled that s. 178.16 of such Act does not render the contents of any of such interceptions or evidence obtained thereby to be inadmissible against the accused in this case.

Another reason for admitting the tapes of the telephone recordings and the body pack, is found in the above-quoted para. (b) in that the witness Szilagyi was a party to all the conversations contained therein with Demeter and so was the originator of the private communication as to the statements therein made by him, or the person intended by the originator to receive it, when Demeter was the speaker, and he has expressly consented to the admission thereof. Counsel for the accused contends that such paragraph should read as if the word "respectively" was inserted therein after the word "has" and before the word "expressly". This interpretation would require the consent of the accused in each case to the admission of such evidence. I find the section as it stands clear and unambiguous and interpret the paragraph as meaning that

the evidence is admissible if either of the parties mentioned in paragraph (b) expressly consent to the admission of the evidence.

The Crown sought to introduce in evidence in the first instance only three of the telephone interception conversations. These were calls made by the accused from his home on July 22, 1973, and were all recorded on one tape, which has been entered as ex. W. Expert testimony established that these calls were made in immediate succession, that is, there was no period of time between any two of the conversations during which the tape recorder was not recording. The first call was made by the accused to his cousin Stephen Demeter and is of no consequence except to establish that there was no other incoming call between that and a call by the accused to his counsel Joseph Pomerant immediately following. In such latter call the accused first inquired if there was any way of ascertaining if his telephone was being tapped. He then went on to tell Mr. Pomerant that he had just received that moment a threatening call from an unknown person to the effect that his daughter was next. Mr. Pomerant, as a result of Demeter's call to him, telephoned the officer in charge of the investigation and told him of such threatening call as the accused intended that he should do. There is no suggestion but that such solicitor believed that his client had received such call. The accused as well reported such alleged threat to the police authorities himself. The next call immediately following was a further call by the accused to his cousin. The first and third calls were in the Hungarian language. The voices of the parties to such calls were all identified. Such statement by Demeter was proven to be false and was a concoction of the accused to mislead the police officers in charge of the investigation into his wife's death and amounted to the indictable offence of public mischief under the *Criminal Code*. Therefore, it does not attract solicitor and client privilege. In any event, the client was not seeking legal advice by such telephone call. Demeter himself destroyed the privilege (if any) by repeating the matter to the police authorities: *Phipson on Evidence*, 11th ed. (1970), p. 599; *Cross on Evidence*, 3rd ed. (1967), p. 242; McWilliams, *Canadian Criminal Evidence* (1974), p. 577.

Counsel for the accused further objected to the admission of the tapes in evidence on the basis of the quality thereof. Certain parts of the body pack, particularly the first one made on July 23, 1973, were unintelligible in some places when background sounds such as a truck passing might obscure the

words spoken. As a result of the evidence given by the investigating police officers and other witnesses, I was satisfied beyond a reasonable doubt that the tapes were not edited or tampered with in any way. The voices of the accused and Szilagyi were both identified on the body pack. I was further satisfied that the tapes, despite the shortcomings which exist as a result of the fact that not all portions of the tape recordings are intelligible, and as a result of the fact that it was necessary to translate most of the conversations from Hungarian into English, were of such a nature and quality that they would be helpful to the jury in deciding the factual issues which exist in this case. The defence had been given full access to such tapes and the translations thereof. I therefore ruled that the jury should be allowed to hear the tapes and to have the conversations from the tapes, which are not in English, translated for them, and I allowed the Crown to call witnesses as to the manner in which such recordings were made and the integrity thereof, and also the three translators to inform the jury as to the accuracy of their translations. By agreement, the actual playing of the tapes, which were entirely in the Hungarian language, was dispensed with. All tapes that were allowed to go in as evidence in the English language were played to the jury. This was the procedure followed in *R. v. Maqsd Ali*, [1965] 2 All E.R. 464, a case in the English Court of Appeal where the original conversations sought to be admitted were in Punjabi dialect limited to a particular area of Pakistan. This fact caused problems in the translation. The tapes as well had a number of imperfections. The jury were then allowed to decide for themselves whether or not the tapes were accurate and unaltered, and how much weight to give the evidence contained therein. I cautioned the jury as regards the inadequacies of the tapes. I also directed them that in assessing the value of the evidence contained therein, or the translations thereof, they should resolve any doubtful passage by giving to it the construction most favourable to the accused and this method of consideration should also be adopted as to any parts thereof which were either difficult of hearing clearly or uncertain by virtue of translation, and that this same principle should be followed as to any portion of the tapes which adjoined an area which was indiscernible.

In the *Maqsd Ali* case, Marshall, J., giving the judgment of the Court, stated that in principle he could see no difference between a tape recording and a photograph. The recordings had been taken before any charge was laid and during the

early part of the investigation. It is further stated in such judgment at p. 469:

The method of the informer and of the eavesdropper is commonly used in the detection of crime. The only difference here was that a mechanical device was the eavesdropper. If, in such circumstances and at such a point in the investigations, the appellants by incautious talk provided evidence against themselves, then in the view of this court it would not be unfair to use it against them. The method of taking the recording cannot affect admissibility as a matter of law, although it must remain very much a matter for the discretion of the judge.

In such case the tape recordings and the written translations were put in as exhibits at trial and the jury took them to the jury room. Conversations between the two accused which had been recorded on tapes had not been heard by any other person at the actual time of the recordings. In such case the mechanical recording was the actual evidence as to what had been said. In the present case the Crown witness Szilagyi was a party to all the body packs and the telephone recording of August 29, 1973, and the communications thereon were between the accused and himself. His relation thereof was the primary evidence of the words used. In those cases the recordings are only confirmation of the evidence. He did listen to them shortly after they were recorded and were used by him as an *aide memoire* in giving his testimony. In this case counsel agreed that the written translations should not be filed as exhibits and, consequently, they were not taken by the jury to the jury room. I had not decided that it was improper to allow such translations to be filed as exhibits but with the consent of all parties felt that this was the better course to follow in this particular case. Conversations recorded had contained references to some matters that were not only irrelevant but objectionable and in some cases prejudicial to the defence. It was agreed because of this that such translations should be audited with irrelevant and objectionable words deleted therefrom. Many of such erasures were agreed upon but in the absence of such agreement I made rulings as to what should be erased. Counsel agreed that in view of all the circumstances it would be a better practice to have the jury rely upon their recollections as to the witnesses' testimony and the reading of such tapes and translations to them.

In *R. v. Foll* (1956), 117 C.C.C. 19, 25 C.R. 69, 19 W.W.R. 661; affirmed 118 C.C.C. 43, 26 C.R. 68, 21 W.W.R. 481, Manitoba Court of Appeal, the trial Judge satisfied himself on a *voir dire* as to the accuracy and integrity of the tape recording

and then placed the matter before the jury to decide the same issues. At p. 20 C.C.C., p. 72 C.R., Friedman, J., stated:

I have reached the conclusion that the tape-recording has not been revised or interfered with in any way, and that accordingly, so far as concerns only the issue of its being an accurate or inaccurate report of what was said, it should not be withheld from the jury.

In my view, the submission of counsel that tapes must be perfectly accurate in order to be admissible is not tenable. In *Colpitts v. The Queen* (1935), 47 C.R. at p. 176 [affirmed [1965] S.C.R. 739, [1966] 1 C.C.C. 146, 47 C.R. 175], Limerick, J.A., of the New Brunswick Court, at p. 180, held that if conflict of evidence exists as to the accuracy of or possible tampering with the tapes, such would not affect admissibility but would be a matter of weight for the jury to determine.

In *Warren, Gzowski & Co. v. Forst & Co.* (1911), 24 O.L.R. 282; affirmed 46 S.C.R. 642, 8 D.L.R. 641, a secretary who overheard a man speaking on the telephone was not allowed to testify as to what she overheard because she did not hear what, if anything, was said by the person at the other end of the line. The Ontario Court of Appeal held that her evidence ought to have been admitted and that the failure of the witness to be able to testify as to the entire conversation was a matter which went to weight and not to admissibility.

In my view, the same reasoning applies to the tape recordings offered in evidence in this case. In deciding admissibility, the Court should, subject to the above dictums, on a *voir dire*, satisfy itself that there is evidence upon which a jury might reasonably be satisfied beyond a reasonable doubt that the tapes are an accurate and authentic reproduction of what they purport to reproduce. The Court should also satisfy itself that the contents and quality of the tapes are such that the tapes will not only not mislead and not confuse the jury but will be of assistance to the jury in providing evidence relevant to issues in the case.

Counsel for the accused argued that because there were certain portions of the tapes that were clearly inadmissible by reason of the fact that they were irrelevant, the resultant editing that would be necessary would render what remained to be of such little assistance to the Court that the tapes should be excluded entirely. This argument applies, of course, only to the body pack tapes and the tapes obtained by Szilagyi by means of the induction coil device. Counsel for the accused therefore argued that these tapes should be excluded by reason of the fact they were of minimal probative value. This

argument cannot succeed. This Court is bound by the decision in *R. v. Wray*, [1971] S.C.R. 272, [1970] 4 C.C.C. 1, 11 D.L.R. (3d) 673, in which decision Martland, J., at p. 293 S.C.R., p. 17 C.C.C., pp. 689-90 D.L.R., enunciated a test as to when evidence can be excluded by reason of the fact that to admit it would be unfair to the accused, in the following words:

The allowance of admissible evidence relevant to the issue before the court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the Court is trifling, which can be said to operate unfairly.

This test was followed in *R. v. Wray (No. 2)*, [1971] 3 O.R. 843, 4 C.C.C. (2d) 378 [affirmed [1974] S.C.R. 565, 10 C.C.C. (2d) 215, 33 D.L.R. (3d) 750], by the Ontario Court of Appeal.

The same test was again applied in *R. v. Glynn*, [1972] 1 O.R. 403, 5 C.C.C. (2d) 364, 15 C.R.N.S. 343, a decision of the Ontario Court of Appeal, involving similar fact evidence.

In the case at hand, after deletion of those parts of the tapes which were irrelevant and other parts which were indiscernible, in my view, the tapes are not of trifling evidentiary value, nor are they of tenuous admissibility. The effect of this evidence on the minds of the jury will not be so disproportionate to its probative value as to prejudice the accused.

As Szilagyi was acting on instructions of the investigating officers in interviewing the accused while wearing a body pack recorder, I determined that he could be regarded as a person in authority and that the Court should determine by *voir dire* if the statements made by the accused to him or in his presence were of a voluntary nature or otherwise. There is no doubt that Demeter at all material times was entirely ignorant of the fact that Szilagyi had given any information to the police that was detrimental to the accused, or that he was aiding the police officers in any way. He had been led to believe that Szilagyi was under suspicion by the police and was being investigated by them. The test as to whether statements given by an accused to one in authority are voluntary or not, is a subjective one. In *R. v. Towler*, [1969] 2 C.C.C. 335, 5 C.R.N.S. 55, 65 W.W.R. 549, MacFarlane, J.A., of the British Columbia Court of Appeal, stated at p. 339 C.C.C., p. 553 W.W.R.:

I think it clear in reason and common sense that the matter must be considered subjectively from the point of view of the effect on the mind of the appellant. It can not be said that his mind was affected

by inducements held out by persons in authority when he does not think that the persons who make the inducements are persons in authority. Further, the point has been considered by this Court and other appellate Courts in Canada.

This decision was followed in *R. v. Pettipiece* (1972), 7 C.C.C. (2d) 133, 18 C.R.N.S. 236, [1972] 5 W.W.R. 129. In any event, I am convinced on the evidence beyond any reasonable doubt that any statements made by the accused to Szilagyi were entirely voluntary as far as he was concerned. A reading of the tapes will indicate clearly that Demeter was the one that at all times was giving instructions to Szilagyi as to what information to give to the police officers.

Mr. Greenspan, who was one of Demeter's solicitors, had requested an interview with Szilagyi. The latter advised the police of such fact. They fitted him with a body pack recorder so that the interview might be recorded. They stated their purpose in this was to satisfy themselves as to whether Demeter was then suspicious as to whether Szilagyi had given information to the police detrimental to himself and also to judge as to the extent of protection that they might find it necessary to afford Szilagyi. They advised him not to let it be known in such interview that he was co-operating with the police and to pretend that he was still being investigated and questioned by them as to his own part in the crime. This interview took place on August 29, 1973. There had been no attempt by the Crown to use such tape recording as evidence. During the cross-examination of Szilagyi, counsel for the accused repeatedly accused such witness of lying to Mr. Greenspan at the time, and also charged that the police officers had procured him to do so. In re-examination of the witness, the Crown then sought permission and were granted leave to have such witness read to the jury the recording of such interview for the purpose of rebutting the charges so made by defence counsel. There was no relation of solicitor and client existing between Greenspan and Szilagyi at any time. Such tape was admitted in evidence solely for the above purpose.

Ruling accordingly.

A 2817

HER MAJESTY THE QUEEN vs. ANDRE DESJARDINS and
JEAN-CLAUDE SUREAU, THE QUEENS COURT (CRIMINAL
DIVISION, QUEBEC, D. MONT; OCTOBER 18, 1974)

C A N A D A

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

THE QUEEN'S COURT
(Criminal Division)

No. 74-9150

October 18, 1974

PRESIDING JUDGE:
HONORABLE JUDGE CLAUDE BISSON

HER MAJESTY THE QUEEN

-vs-

ANDRE DESJARDINS

-and-

JEAN-CLAUDE SUREAU

D E C I S I O N

Pursuant to the provisions of Article
576.1 of the Criminal Code, this
decision may not be published until
the conclusion of the present case.

Andre Desjardins and Jean-Claude Sureau are charged with
extortion and with conspiracy to commit that crime in violation of
Articles 305 and 423 of the Criminal Code.

The prosecution wishes to introduce into evidence tapes of five telephone conversations in which Andre Desjardins participated as follows:

June 14, 1974 at approximately 8:15 A.M.:

Telephone conversation between Andre Desjardins and
Reynald Bertrand.

June 15, 1974 at approximately 10:45 A.M.:

Call from Andre Desjardins to Roger Perreault.

June 15, 1974 at approximately 1:15 P.M.:

Telephone conversation between Andre Desjardins and
Yvon Dansereau.

June 16, 1974 at approximately 8:30 P.M.:

Telephone conversation between Andre Desjardins and
Roger Perreault.

June 18, 1974:

Telephone conversation between Andre Desjardins and
Paul Lapointe.

In order that the judge may decide on the admissibility of these five telephone conversations as evidence, the prosecution wishes to conduct a voir-dire to permit the undersigned to ascertain the authenticity, accuracy and integrity of the tapes.

However, the defense has objected to such a voir-dire maintaining that regardless of the quality of the tapes they cannot be introduced as evidence in any event because such evidence would not be legal.

THE LAW ON PROTECTION OF PRIVACY

Reference is made to Chapter 50 of 21-22 Eliz. II, passed

on January 14, 1974.

This law has seven articles and its main purpose is to incorporate Part IV.1 into the Criminal Code, that is Articles 178.1 to 178.23.

Article 7 stipulates that the law will become effective on a date to be determined by proclamation.

On May 21, 1974 the Governor General of Canada issued a proclamation decreeing "that the law on protection of privacy would become effective and enforceable as of June 30, 1974".

This proclamation was filed as number TR/74-68 of June 12, 1974 and was published in the Gazette of Canada, part II, volume 108, number 11, the June 12, 1974 edition.

There is no question that the nature of the telephone conversations, which are the object of this decision, is such that they would have fallen within the scope of the law if they had been taped on or after June 30, 1974.

Article 178.11 makes it a crime to intercept a private communication except when there is consent on the part of the intercepted person or when the intercepting person has obtained due authorization pursuant to the provisions set forth in the articles thereafter.

Further, in Article 178.16 the following is decreed:

- (1) "An intercepted private communication and evidence obtained directly or indirectly as result of information obtained by the interception of a private communication are both inadmissible as evidence against the originator or against the person with

whom the originator intended to communicate except when:

- a) the interception is done legally; or
- b) the originator of the private communication or the person with whom the originator intended to communicate has expressly consented to its admission into evidence."

(2) . . .

- (3) "Paragraph (1) applies to all criminal prosecution as well as to all civil prosecution and any other matter whatsoever within the competence of the Parliament of Canada."

As to the case in point, since the law did not become effective until June 30, 1974, is it really possible to submit tapes of telephone conversations held on June 14th, 15th, 16th and 18th to fulfill the purposes of evidence that one wishes to introduce in October, 1974.

Certain remarks are pertinent.

First, it must be noted that if the legislator has created a crime in paragraph (1) of Article 178.11 it is not, if one may say so, a matter of an absolute crime since no crime is committed if the person consented to bein taped or if the authorization has been obtained from the proper authorities.

It cannot be claimed that on June 14th, 15th, 16th and 18th whoever intercepted the telephone communications of Andre Desjardins hastened to commit acts which two weeks later would by necessity become violations.

Moreover, it must be clearly established that before June 30, 1974 non-authorized interception of telephone communications did

not constitute a crime.

Furthermore, if prior to June 30, 1974, Article 7 of the Law by interpretation, Chapter I 23, S.R.C. 1970, could permit applications for authorization to set up an electronic monitoring system as of 00:01 A.M. of June 30, 1974, no authorization could have been granted for any interception that had to take place before that specific instant.

Therefore, on June 14th, 15th, 16th and 18th nothing could have been done to obtain authorization for interceptions that had to be done on those dates.

In the case in question, one of the communications preceded the events which were described in the evidence and which took place on June 14th, while the other four followed the same events on subsequent days.

To return to Article 178.16, is there any reason to accord it retrospective effect and to declare that it constitutes an absolute impediment to the introduction of evidence, as of June 30, 1974, that consists of communications intercepted before that date?

It must be noted that in Article 178.16 (1) the legislator did not say that only communications that were intercepted pursuant to Chapter 50 would be admissible as evidence.

If he had so stated it would have been possible to maintain that the legislator had determined that communications intercepted prior to June 30, 1974, when the law came into effect, were inadmissible thereafter.

Instead he actually said that a communication is not admissible as evidence unless it is legally intercepted.

It is an accepted doctrine that legislation can only have retrospective effect to the degree indicated by the legislator if

not expressly at least implicitly.

In "YOUNG v. ADAMS" published in 1898 A.C. 469 the private Council declared:

"Retrospective effect ought not to be given to a statute unless an intention to that effect is expressed in plain and unambiguous language".

More specifically, Lord Watson announcing the decision on behalf of all his colleagues expressed himself in the following terms on page 476:

"... their Lordships are of the opinion that the rule laid down by Erle C.J. in *Midland Ry. Co. v. Pye* (3) ought to apply. They think that, in a case like the present, the learned Chief Justice was right in saying that a retrospective operation ought not to be given to the statute, "unless the intention of the Legislature that it should be so construed is expressed in plain and unambiguous language, because it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment". "

(3) 10 C.B. (N.S.) 191.

But, we are told by the defense, the provisions of Article 178.16 are procedural and it is a constant matter of doctrine and of law that procedural legislation is given retrospective effect.

If this proposition is correct when there is legislation which brings about changes in the procedure to be followed in the application of a substantive right already in existence, I do not believe one

can extend this application when the procedure is enacted at the same time as the substantive right is created.

I now refer to a judgment delivered by the Chamber of Lords in "ATTORNEY GENERAL AND VERNAZZA" published in 1960 A.C. 965.

On page 977 Lord Denning said:

"If the new Act affects Mr. Vernazza's substantive rights, it will not be held to apply to proceedings which have already commenced, unless a clear intention to that effect is manifested, see Colonial Sugar Refining Co. Ltd. v. Irving. (3). But if the new Act affects matters of procedure only, then prima facie it applies to all actions, pending as well as future for, as Lord Blackburn said: "Alterations in the form of procedure are "always retrospective, unless there is some good reason or other "why they should not be", see Gardner v. Lucas (4).

(3) (1905) A.C. 369

(4) (1878) 3 App. Cas. 582, 603, H.L.

Likewise, one can cite in comparison the decision of the Supreme Court of Canada in "HOWARD SMITH PAPER MILLS, LTD., ET AL v. THE QUEEN" published in 118 C.C.C. 321.

In this matter it is decided that Article 41 of the Law on the investigation of coalitions as amended in 1952, introduced revolutionary changes in procedure and it was given retrospective effect considering, as set forth in the summary, that:

"... it creates no offence and takes away no defence nor does it render criminal any course

of conduct which was not already so or alter the legal effect of any previous transaction."

In the case in point, Chapter 50 only established procedures. On the contrary, the procedures decreed therein were mere corollaries to a new right being legislated by the decree of a new crime.

How can it be possible to maintain that the procedures that were set forth can apply to activities which did not constitute violations before June 30, 1974.

Furthermore, it must also be remembered that the interception of private communications is not a crime in all cases since it is an absolutely legal practiced when authorized by the person being intercepted or when the required legal authorizations are obtained.

In conclusion, even if it could be reasonably maintained that 178.16 is a rule of procedure, one cannot accord it any retrospective effect because the legislation that enacted it constitutes a whole in which 178.16 is only a corollary to the new crime that was created.

Under such circumstances, private communications that were intercepted prior to June 30, 1974 are not bound by Chapter 50 and the evidence can be introduced before the Court after June 30, 1974 in the same manner as before that date.

In conclusion the Court finds that after establishing through a voir-dire the authenticity, accuracy and integrity of the tapes of the five conversations of Andre Desjardins with others on June 14, 15, 16 and 18, 1974 nothing prevents these tapes from being admitted into evidence today.

In view of the foregoing the Court ORDERS that a voir-dire be conducted.

(Illegible Signature)
J. C. B. R.

A 2825

DOCTRINE AND JURISPRUDENCE CONSULTED

ON THE RETROSPECTION OF LAWS

I

Craies on Statute Law, 7th edition 1971, chapter entitled "Retrospective Enactments", on pages 387 to 406.

II

Maxwell on Interpretation of Statutes, 12th edition 1969, chapter entitled "Retrospective Operation of Statutes", pages 215 to 227.

ON THE RETROSPECTION OF CHAPTER 50

I

M. Manning - "Protection of Privacy Act" 1974 chapter entitled "Admissibility of Evidence obtained prior to the coming into force of this Act", pages 108 to 115.

II

Decision of Honorable Judge Martin of the Court of the Count of Ontario, delivered in Toronto on September 23, 1974 in the case of "HER MAJESTY THE QUEEN v. BARTON ROY LESARGE", file No. S-312/74.

MR. GERARD GIROUARD, Counsel for the Crown.

MR. MICHEL PROULX, Counsel for Andre Desjardins.

MR. PIERRE MORNEAU, Counsel for Jean-Claude Sureau.

DAME MARGUERITE DASTI vs. PATENAUDE and LAVALLEE.
COURT FOR SESSIONS OF THE PEACE (QUEBEC, D. MOND.;
DECEMBER 23, 1974)

A 2826

Note: Translation begins at page A-2843

P-6
C A N A D A

PROVINCE DE QUEBEC

DISTRICT DE MONTREAL

COUR DES SESSIONS DE LA PAIX

SOUS LA PRESIDENCE DE MONSIEUR LE JUGE ANDRE DURANLEAU, J.C.S.P.

DAME MARGUERITE DASTI,

dénonciatrice,

-VS-

HERVE PATENAUDE,

-ET-

CLAUDE LAVALLEE,

DECISION APRES PRE-ENQUETE

Le 23 décembre, 1974

A 2827

PROCEDURE:

Le 16 décembre 1974, j'assermentais les dénonciations de Dame Marguerite Dasti impliquant sous divers chefs d'accusation Hervé Patenaude et Claude Lavallée.

Conformément à l'article 455.3 du Code criminel, il fut décidé de tenir ce qu'il est convenu d'appeler une pré-enquête.

Le 16 décembre 1974, Me Léo-R. Maranda, procureur de la dénonciatrice, demanda la production de la transcription de notes sténographiques certifiées conformes par le Chief Deputy Clerk de la United States District Court, de même que par John R. Bartels, Juge de cette Cour pour le même district, et ce sous la cote EP-1.

Ces notes sténographiques visaient les témoignages rendus les 14 et 29 novembre 1974 par Hervé Patenaude et Claude Lavallée au cours de "pre-trials conferences" tenus devant le Juge en Chef Jacob Mishler U.S.D.J.C. dans la cause U.S. -vs- Frank Cotroni et al (73 C.R. 898).

Le 18 décembre 1974, le procureur de la dénonciatrice présenta les témoins Richard Croteau et Bernard Couture. A la suite de ma décision établissant la non pertinence d'une question visant l'obtention des noms et des numéros de téléphone ayant fait l'objet d'écoute électronique. (Wire-tapping) au cours des

diverses opérations "Vega" (notes sténographiques, page NV-45), la dénonciatrice, par l'intermédiaire de son procureur, déclara n'avoir aucun autre témoin à offrir à l'appui de la dénonciation.

* * *

ANALYSE DE LA PREUVE:

Je crois devoir dire immédiatement que la lecture des témoignages de Patenaude et Lavallée (1), m'a fourni d'amples détails sur le modus operandi des "wire-tapping" concernés et que si j'ai décidé de mettre un frein à la pré-enquête, c'est qu'il m'apparaissait primordial de décider de la question de droit avant d'amonceler en preuve une série de faits éventuellement inutiles eu égard à la décision que je dois rendre.

Je m'explique par deux exemples; si l'écoute électronique théoriquement fort bien expliquée par Lavallée, n'est pas créatrice d'infractions et/ou d'actes criminels, à quelle fin devrais-je permettre la production devant moi de toutes les bandes magnétiques résultant des opérations Vega? Pourquoi me serait-il alors utile de connaître les moindres détails desdites opérations?

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- (1) Epoque: Voir pages 13 et 29 du témoignage Patenaude;
Autorisation donnée par Patenaude seulement (p. 15);
Motifs de l'autorisation: pages 33, 34, 44, 45;
Nombre d'autorisations données: page 18;
Autorisation donnée verbalement: pages 16, 28;
Participants au consensus: page 29;
Cas d'écoute électronique: pages 13, 17, 29;
Mode d'obtention d'autorisations: page 41;
Aucune compensation à Bell Canada: page 44 et suivantes
Modes d'écoute: témoignage de Lavallée

Ainsi, en gardant en mémoire les témoignages de Patenaud et Lavallée, j'ai cru plus adéquat de décider "en droit", à savoir, les modes d'écoute électronique peuvent-ils "prima facie" donner ouverture aux divers chefs d'accusation des dénonciations. Si oui, proprio motu, il sera toujours en mon pouvoir, et même de mon devoir, de rappeler les témoins déjà offerts pour qu'ils complètent leur déposition par des faits plus ad rem et même d'entendre d'autres témoins aux mêmes fins.

Suivant la décision prise "sur le droit", ces faits devenus pertinents pourraient être mis en preuve pour établir prima facie le bien fondé des modalités ou détails de chacun des chefs d'accusation des dénonciations.

Je crois toutefois que le coeur du problème est avant tout de savoir si oui ou non l'écoute électronique (wire-tapping) avant le 30 juin 1974, (2) était ou non légale (illégale non seulement dans le sens général de défendue comme telle par la Loi (178.11 du c. cr.) mais aussi dans le sens de générateur de crimes).

* * *

R. -VS- CHAPMAN et GRANGE:

Je ne crois pas me tromper en affirmant que le savant

/....5

- (2) Date de la promulgation de la Loi modifiant le Code criminel et autres lois, Loi citée sous le titre: Loi sur la protection de la vie privée (21-22 Elizabeth II, chap. 50) insérant au Code criminel les articles 176.1 à 178.23 inclusivement.

procureur de la dénonciatrice en optant pour l'illégalité de tel procédé, s'est fortement inspiré de la décision rendue par la Cour d'Appel d'Ontario dans l'arrêt R. -vs- Chapman and Grange (3) qui a maintenu des verdicts de culpabilité prononcés le 28 mars 1972 par le juge Moore (4) contre le constable (Metropolitan Toronto Police Department) Chapman et Grange, président de la compagnie Canadian Driver Pool Limited et ce sous une accusation de complot "to effect an unlawful purpose, to wit: acquire knowledge of certain telephone conversations not addressed to them and divulge their purport."

Le Juge Arnup fait remarquer à juste titre que:

"The identity of language between s. 112 of the Telephone Act and the language used in particularizing the "unlawful purpose" in the indictment is obvious. In substance, the unlawful purpose was to commit the act prohibited by s. 112 of the Telephone Act."

De cette décision, je me permets de citer le passage suivant:

"It is of course fundamental that the Court keep in mind at all times in this case that the charge is one of conspiracy and that overt acts proved for the purpose of implicating one or more of the conspirators need not themselves be acts which constitute an offence. The trial Judge clearly had this in his mind throughout his reasons for judgment. In my view, it is clear from the

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(3) (1973) 11 C.C.C. (2e s.) 84;

(4) 20 C.R.H.S. 145;

reasons for judgment, and from the evidence upon which the trial Judge reached his conclusions of fact, that the agreed upon purpose of Chapman and Grange was to obtain the precise conversation passing over the union's telephone line and to divulge the substance of it to Canadian Driver Pool Limited and some of its employees."

En effet, ledit article 112 se lit comme suit:

"Every person who, having acquired knowledge of any conversation or message passing over any telephone line not addressed to or intended for such person, divulges the purport or substance of the conversation or message, except when lawfully authorized of directed so to do, is guilty of an offence and on summary conviction is liable to a fine of not more than \$50. or to imprisonment for a term of not more than thirty days, or to both."

Après une révision des arguments des procureurs, le Juge Arnup en vient aux conclusions suivantes:

"In my view, a principle underlies both ss. 111 and 112. It is that telephone conversations are intended to be private between the persons who are having them (including persons authorized by them to listen). This right to a private telephone conversation is protected against the acts of operators or other persons in the employ of the system, and against the acts of others who acquire knowledge of a private telephone conversation not intended for them, and makes the divulging of such conversations an offence punishable on summary conviction."

"The Legislature of Ontario was not seeking to prohibit a social evil. It was seeking to create a right of privacy with respect to telephone conversations, the divulging of which was prohibited under penalty. This being

so, the Legislature was competent to pass s. 112 under s. 92 (13) of the B.N.A. Act, 1867 since it was enacting legislation in relation to a "civil right".

Est-il utile de dire que je suis en accord avec de telles propositions, bien qu'il faille dorénavant tenir compte de la loi sur la protection de la vie privée.

Il est à noter immédiatement pour les fins de la discussion que l'article 24 de "l'Acte des Compagnies de télégraphe et de téléphone" (1964 - S.R.Q., chap. 286) auquel les chefs 9 et 10 des dénonciations réfèrent, se lit lui, comme suit:

"Every person who listens to or acquires knowledge of any conversation or message passing over the lines of a telephone system, not addressed to or intended for such person, and divulges the same of the purport or substance thereof, except when lawfully authorized or directed so to do, shall be liable to the same penalty and imprisonment as are enacted in section 23 R.S. 1941, c. 298, s. 4."

Dès lors, étant à même de constater la similitude entre les deux articles, il devient permis de conclure que tout raisonnement fait eu égard au "Telephone Act" ontarien peut s'appliquer mutatis mutandis à l'Acte des Compagnies de télégraphe et de téléphone québécoise. En un mot, une divergence d'opinion ne saurait s'expliquer par une différence dans les textes.

Le Juge Moore (5) écrivait:

/...8

(5) R. -vs- Chapman et al 20 C.R.N.S. 145

A 2833

"The wording of this indictment would cover all three classes of wrongful acts. I conclude therefore that there are both statutory and common law prohibitions against the common purpose that was in the minds of Chapman and Grange on or about October 8, 1971, and that the purpose was unlawful."

Me G. A. Martin c.r., a relevé cette affirmation comme erronée et le juge Arnup rejette cette prétention en disant:

"The indictment in this case, however, does not, in my view, lend itself to this kind of treatment. As I have said earlier, it is obviously aimed at s. 112 of the Telephone Act; it certainly does not invoke any unlawfulness by reason of breach of s. 25 of the Bell Telephone Act and, in my view, it is not aimed at a purpose unlawful at common law. I am not suggesting that an indictment, based on the facts proved in this case, could not have been drawn in such a way as to enable the Crown at least to argue that the purpose was unlawful at common law, even if not a crime at common law. I am simply saying that that is not this case. The Crown chose to charge a conspiracy which was in my view founded solely on s. 112 of the Telephone Act.

This makes it unnecessary to consider further the suggestion of Mr. Campbell that eavesdropping was an "unlawful act" at common law (cf. Frey -vs- Fedoruk, (1950) S.C.R. 517, (1950) 3 D.L.R. 513, 97 C.C.C. 1), or whether eavesdropping constitutes "the tort of breach of confidence" "which Mr. Campbell, I think optimistically, described as a "disputed area").

It follows also that I do not need to consider further the question of "public mischief", and conspiracy to commit it. This is not what these appellants were charged with doing.

My conclusion, accordingly, is that s. 112 of the Telephone Act is valid legislation; and agreement to contravene it, either in the sense of depriving persons entitled to its protection of the civil right which that section gives them, or to contravene the section merely by doing what is prohibited on terms of penalty, is an agreement to effect an unlawful purpose;"

J'entends par là qu'une entente pour contrevenir à l'article 112 déjà cité, soit généralement privant des personnes du droit à elles implicitement accordé par ledit article (le caractère privé de la communication) ou en posant un ou des gestes prohibés spécifiquement, est une entente qui poursuit un "unlawful purpose" et par conséquent devient un complot au sens de l'article 423 (2) a) du Code criminel.

Mais l'article 112 déjà cité crée une ou des exceptions par l'usage des mots: "except when lawfully authorized or directed to do so,".

La cause de Chapman ne révèle pas qu'on y est prétendu^d que ce dernier, dans l'exercice de ses fonctions de constable, ait été légalement autorisé ou mandaté pour agir de la sorte.

Si le Juge Arnup en vient à la conclusion qu'il y a eu "an agreement to effect an unlawful purpose", il a écarté implicitement la possibilité de recourir à l'exception prévue à l'article 112 et ce à juste titre, je crois, compte tenu d'une remarque de Grange à l'effet que "this would keep the company (sans référence à Redpath Sugars' chez qui la grève n'avait pas encore débutée) ahead of the unions as far as knowing what would be happening."

Si j'examine la preuve faite devant moi, je dois me rappeler que le motif qui a poussé Patenaude à autoriser les

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opérations Vega, se dégage facilement et c'est indubitablement le même qui a poussé le législateur à adopter l'article 178.12 du Code criminel.

Ceux donnés par Patenaude apparaissent à la page 15 de son témoignage.

Après avoir étudié l'opinion du Juge Arnup, je ne crois pas que l'arrêt Chapman puisse trouver ici application. Il est vrai que dans les deux (2) causes des membres de forces policières sont en cause, mais leur mobile est indubitablement différent et si l'article 112 déjà cité prévoit une ou des exceptions, c'est, à mon avis, en prévision d'une situation comme celle que révèlent les faits mis en preuve devant moi.

COPELAND et ADAMSON ET AL:

Pour répondre à la question préalablement posée eu égard à la légalité ou l'illégalité du "wire-tapping", j'ai lu avec beaucoup d'intérêt la cause de Copeland et Adamson et al (6) où le juge Grant de la Ontario High Court of Justice devait, le 19 avril 1972, statuer sur la demande d'émission d'un bref de mandamus et de prohibition requérant au Chef de police et à celui du "Board of Commissioners of Police" du Toronto Metropolitain, d'ordonner aux membres et employés civils du "Metropolitain Toronto Police Force" de cesser et discontinuer toute forme d'écoute électronique (audio surveillance ou wire-tapping).

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(6) Rapportée à 7 C.C.C. (2e s.) p. 393

Le requérant est un avocat exerçant sa profession en société à Toronto. Le 7 janvier 1971, quoique ne prétendant pas être l'objet de telle surveillance, il mit le Board of Commissioners of Police en demeure de cesser telle pratique qui, en réponse, lui expédia une copie d'une résolution adoptée en mars 1969 qui donne les motifs qui rendent impérieux l'usage de telle méthode de surveillance et les circonstances spéciales dans lesquelles la chose est permise.

Le requérant invoque à l'appui de sa prétention, l'article 112 du Telephone Act, (R.S.O. 1970, c. 457) qui se lit comme suit:

"Every person who, having acquired knowledge of any conversation or message passing over any telephone line not addressed to or intended for such person, divulges the purport or substance of the conversation or message, except when lawfully authorized or directed so to do, is guilty of an offence and on summary conviction is liable to a fine of not more than \$50. or to imprisonment for a term of not more than thirty days, or to both."

Il invoque en outre, comme la dénonciatrice devant moi, l'article 25 de "An Act to incorporate the Bell Telephone Company of Canada" (1880 - Can. c. 67) qui se lit comme suit:

"Any person who shall wilfully or maliciously injure, molest or destroy any of the lines, posts or other material or property of the Company, or in any way wilfully obstruct or interfere with the working of the said telephone lines, or intercept any message transmitted thereon, shall be guilty of a misdemeanor."

Le Juge Grant a aussi résumé la question:

"I am considering on this motion only whether the Court should, as the law now stands, restrain the Chief of Police and the Board of Commissioners of Police for Metropolitan Toronto from using audio surveillance in the course of their duties in those cases where the chief of police has given his approval after being of opinion that there is reasonable and probable cause to believe that a criminal offence has been or is about to be committed."

Le savant magistrat fait la distinction utile entre "an alleged recognition of public duty to excuse breach of the criminal law by police officers" d'une part et "the justification which the criminal Code prescribes to officers where they are proceeding to enforce the law."

A la lecture des témoignages de Patenaude et Lavallée, je ne peux que répéter mutatis mutandis les propos du juge Grant:

"The material before me only indicates that audio surveillance is being used by the police in Metropolitan Toronto in the manner prescribed by such policy statement of the Board. This establishes that such equipment is used only with the approval in each case of the chief of police granted only when in his opinion there is reasonable and probable cause to believe that a criminal offence has been or is about to be committed. As the law now stands, such interception by a police officer in my opinion does not amount to an offence against s. 112 of the Telephone Act (Ontario) for the reasons set out above."

Quant à l'article 25 de "An Act to incorporate the Bell Telephone Company of Canada", je partage entièrement les propos tenus par le Juge Grante, suivants:

"The only part of such section which it might be said would be breached by wire-tapping would be the words "interfere" or "intercept". Can it be said that listening in on a telephone conversation is properly described by either of such terms? The Shorter Oxford English dictionary defines the word "interfere" as follows:

"to interpose - intersperse; to strike against each other; to come into collision; to exercise reciprocal action so as to increase, diminish or nullify the natural effects of each."

It defines the word "intercept" as follows:

"To take or seize by the way of before arrival at a destined place; to stop or interrupt the progress or course of; to interrupt communications or connections with."

I do not believe that wire-tapping which does not impede the conversation between the parties nor impede its progress can form a breach of such section because the material before me does not indicate that the audio surveillance creates any disturbance of the conversation."

Même si l'article 1612 du Code civil établit "a civil remedy for invasion of privacy" (7) cela n'a pas pour but de conférer un droit légalement imposable à l'usage confidentiel d'une ligne téléphonique privée même dans le cas d'un "ring down circuit." Le code civil ne crée pas le droit à l'intimité ou au secret de conversation per se n'existe pas.

R. -VS- PEARSON:

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(7) Copeland and Adamson cités supra

C'est le juge Dohm qui écrivait (8):

"There is no law in Canada at the present time prohibiting the use of recorded evidence obtained by wire tapping, as was done here. In my opinion, there is no violation of the Canadian Bill of Rights, 1960, ch. 44, as one counsel urged."

Je suis bien prévenu qu'avant juin 1974, il y avait en cette matière deux problèmes connexes qui souvent s'entrecroisent, d'abord celui de l'admissibilité en preuve des communications privées interceptées à l'aide des méthodes modernes d'écoute électronique (9) puis celui de la légalité (ou illégalité pour certains) de telles interceptions

D'où la nécessité en ayant recours à la jurisprudence, de garder en mémoire cette distinction puisque le seul problème que j'ai à résoudre est celui de la légalité ou de l'illégalité.

Prémuni de cette distinction, il reste, à mon avis, encore fort intéressant de prendre connaissance des opinions émises sur le sujet par les juges Martin et Bisson

* * *

R. -vs- BARTON ROY LESAGE:

Le 23 septembre 1974, le Juge Martin (10) était appelé à se prononcer sur le bien fondé d'un voir-dire dans le but d'introduire en preuve "wire-tapping evidence". La défense y fit

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(8) R. -vs- Pearson (1969) 66 W.W.R. 320 (331-2)

(9) Dispositif électro-magnétique, acoustique, mécanique ou autre (178.1 c.cr.)

objection en s'appuyant sur l'article 178.16 du Code criminel.

Le juge Martin tient les propos suivants:

"Since Section 178.16 (1) appears substantially to be a procedural provision, should it be given in the circumstances a retrospective operation? The answer to this question, in my view, depends in part upon whether wire-tapping was illegal prior to June 30th, 1974."

Et plus loin, il répond à cette question comme suit:

"By virtue of the foregoing authorities for the purposes of the criminal law, in the circumstances of this case, audio surveillance or wire-tapping was not per se illegal prior to June 30th, 1974."

Puis il ajoute en concluant:

"As wire-tapping was not, in my judgment, illegal in the circumstances existing in this case, the instant case, prior to the coming into force of the Protection of Privacy Act,".

* * *

R. -VS- DESJARDINS ET ANUAU:

Plus récemment, le 18 octobre 1974, le Juge Bisson (11) fut appelé à rendre une décision dans des circonstances semblables.

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(11) R. -vs- Desjardins et Anua, C.B.R. 74-9150

Il écrit aux pages 3 et 4 de sa décision:

"D'abord, il convient de noter que si le législateur a créé un crime au paragraphe (1) de l'article 178.11, il ne s'agissait pas, si l'on peut s'exprimer ainsi, d'un crime absolu puisqu'il n'y a pas de crime si, d'une part, la personne interceptée a donné son autorisation ou si d'autre part, une autorisation a été obtenue des autorités compétentes."

...

"Par ailleurs il faut bien reconnaître qu'avant le 30 juin 1974, l'interception non autorisée d'une communication téléphonique ne constituait pas un crime."

Je pousse plus loin le raisonnement en énonçant que:

"Il importe de noter que dans sa rédaction de l'article 178.16(1), le législateur n'a pas dit que ne seront admissibles en preuve que les communications qui ont été interceptées conformément au chapitre 50.

Se serait-il prononcé de la sorte, on aurait pu soutenir que le législateur avait indiqué qu'il entendait que les communications interceptées avant l'entrée en vigueur de la loi, le 30 juin 1974, soient désormais inadmissibles."

Je crois devoir partager ces opinions.

Est-il besoin d'ajouter qu'aucun indice de mens rea coupable ne ressort des témoignages de Patenaude et Lavallée.

Où est l'animus furandi nécessaire au vol de télécommunications?
Où est l'intention coupable nécessaire au méfait? Au contraire,
les gestes posés le furent dans le plus grand intérêt de la
justice. Bien que la chose me paraisse aussi superflue, je me
risque à ajouter que si une ligne d'abonné a été utilisé pour fin
de vérification et si quelques fils ont subi des entailles super-
ficielles, l'adage romain ne minimis non curat lex trouve ici
l'application.

Par conséquent, après analyse du droit, je conclus qu'il
n'est pas nécessaire de continuer la pré-enquête en accumulant
des précisions additionnelles quant aux faits dénoncés;

Que de plus, je dois rejeter les plaintes de la dénon-
ciatrice Dame Marguerite Dasti contre Hervé Patenaude et Claude
Lavallée en les déclarant mal fondées pour qu'il me soit permis
de leur donner suite, suivant l'une ou l'autre des formes pres-
crites à l'article 455.3 du Code criminel.

Le 23 décembre, 1974

André Duranleau, J.C.S.P.

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C A N A D A

PROVINCE OF QUEBEC

DISTRICT OF MONTREAL

COURT FOR SESSIONS OF THE PEACE

PRESIDING JUDGE: HONORABLE JUSTICE ANDRE DURANLEAU, J.C.S.P.

MRS. MARGUERITE DASTI

complainant

vs.

HERVE PATENAUDE

and

CLAUDE LAVALLEE

DECISION AFTER PRELIMINARY HEARING

December 23, 1974

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PROCEDURE:

On December 16, 1974 Mrs. Marguerite Dasti, under oath, presented a complaint charging Herve Patenaude and Claude Lavallee with various counts.

In accordance with Article 455.3 of the Criminal Code, it was decided to hold what, by general agreement was called a preliminary hearing.

On December 16, 1974, Mr. Leo-R. Maranda, counsel for the complainant, requested that the transcript of the official record, duly certified by the Chief Deputy Clerk of the United States District Court as well as by John R. Bartels, Judge of this Court for the same district and bearing the code EP-1, be produced.

This transcript referred to the testimony given on November 29, 1974 by Herve Patenaude and Claude Lavallee during the "pre-trial conferences" held before Chief Judge Jacob Mishler U.S.D.J.C. in the case of the U.S. v. FRANK COTRONI et al (73 CR 898).

On December 18, 1974 counsel for the complainant brought forth witnesses Richard Croteau and Bernard Couture. Following my decision establishing the irrelevance of an issue seeking to obtain the names and telephone numbers that has been subjected to wire-tapping during various "VEGA" operations (transcript, pg. NV-45), the complainant through her counsel, stated that she had no other witness to offer in support of her complaint.

* * *

EXAMINATION OF THE EVIDENCE:

I believe I must say at the onset that reading the testimony of Patenaude and Lavallee (1), supplied me with ample details as to the

- (1) Time: See pages 13 and 29 of Patenaude's testimony;
Authorization given by Patenaude only (p. 15);
Reasons for authorization: pgs. 33, 34, 44, 45;
Number of authorizations given: pg. 18;
Verbal authorizations given: pg. 16, 28;
Participants in the consensus: pg. 29
Wire-tapping case: pg. 13, 17, 29;
Manner of obtaining the authorizations: pg. 41
No compensation whatsoever to Bell Canada: pg. 44 and thereafter
Manner of tapping: Lavallee's testimony

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modus operandi of the wire-tapping in question and that if I have decided to limit the scope of the preliminary hearing, it is because it seemed to me of major importance to determine the facts of law before accumulating as evidence a series of facts eventually rendered useless in view of the decision I must render.

I elaborate with two examples: If theoretically wire-tapping, as was so competently explained by Lavallee, does not constitute a violation and/or criminal act, what would be the purpose of my permitting that all the tapes resulting from the "VEGA" operation be brought before me? Why would it then be useful for me to be aware of the minutest details of the said operation?

And thus, bearing in mind the testimony of Patenaude and Lavallee, I deem it more appropriate to decide on the law; that is, the manner of wire-tapping, can it "prima facie" give rise to various counts in complaints? If so, *proprio motu*, it will always be within my power, and actually my duty, to recall the witnesses already brought forth so that they complete their statements with more *ad rem* facts and even to listen to other witnesses for the same purpose.

Following the decision made "as to the law" those facts that became relevant could be introduced in evidence to establish *prima facie* the proper grounds for the clauses or details of each one of the counts in the complaints.

I believe, nevertheless, that the core of the problem is to first learn whether wire-tapping prior to June 30, 1974 (2) was legal or not (not only illegal in the general sense of forbidden *per se* by the law (178.11 of Cr. C.) but also in the sense of contributing to further criminal acts).

(2) Date of promulgation of the law amending the Criminal Code and other laws, a law set forth under the title: Protection of Privacy Act (21-22 Eliz II, Chapter 50) inserting into the Criminal Code Articles 178.1 to 178.23 inclusive.

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R. vs. CHAPMAN AND GRANGE:

I do not believe I am mistaken when I assert that the learned counsel for the complainant in favoring the illegality of such procedure, was strongly inspired by the decision that came down from the Court of Appeals of Ontario in the opinion R. vs. Chapman and Grange (3) affirming the verdicts of guilty given on March 28, 1972. Judge Moore against Constable Chapman (Metropolitan Police Department)(4) and Grange President of the Company Canada Driver Pool Limited, under indictment for conspiracy "to effect an unlawful purpose, to wit, acquire knowledge of certain telephone conversations not addressed to them and to divulge their purport."

Judge Arnup justly remarked that:

"The identity of language between s. 112 of the Telephone Act and the language used in particularizing the "unlawful purpose" in the indictment is obvious. In substance the unlawful purpose was to commit the act prohibited by s. 112 of the Telephone Act."

From this decision, I take the liberty of quoting the following section:

"It is of course fundamental that the Court keep in mind at all times in this case that the charge is one of conspiracy and that overt acts proved for the purpose of implicating one or more of the conspirators need not themselves be acts which constitute an offence. The trial Judge clearly had this in mind throughout his reasons for judgment. In my view it is clear from the reasons for judgment, and from the evidence upon which the trial judge reached his conclusions of fact, that the agreed upon purpose of Chapman and Grange was to obtain the precise conversation passing over the union's telephone line and to divulge the substance of it to Canadian Driver Pool Limited and some of its employees."

In fact Article 112 reads as follows:

"Every person who, having acquired knowledge of any conversation or message passing over any telephone line not addressed to or intended for such person, divulges the purport or substance of the conversation or message, except when lawfully authorized or directed so to do, is guilty

(3) (1973) 11 C.C.C. (2nd s.) 84;

(4) 20 C.R.N.S. 145;

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of an offence and on summary conviction is liable to a fine of not more than \$50.00 or to imprisonment for a term of not more than 30 days, or to both."

After a review of the arguments of the counselors, Judge

Arnup arrived at the following conclusions:

"In my view, a principle underlies both ss. 111 and 112. It is that telephone conversations are intended to be private between the persons who are having them (including persons authorized by them to listen). This right to a private telephone conversation is protected against the acts of operators or other persons in the employ of the system, and against the acts of others who acquire knowledge of a private telephone conversation not intended for them, and makes the divulging of such conversations an offence punishable on summary conviction."

"The Legislature of Ontario was not seeking to prohibit a social evil. It was seeking to create a right of privacy with respect to telephone conversations, the divulging of which was prohibited under penalty. This being so, the Legislature was competent to pass s.112 under s. 92 (13) of the B.N.A. Act, 1867 since it was enacting legislation in relation to "civil right".

Is it of any use to say that I agree with such propositions even though from now on one must bear in mind the Protection of Privacy Act.

It should be noted immediately for the purpose of the discussion that Article 24 of The Telephone and Telegraph Companies Act (1964-S.R.Q., Chap. 286) to which counts numbers 9 and 10 of the complaint refer, reads as follows:

"Every person who listens to or acquires knowledge of any conversation or message passing over the lines of a telephone system not addressed to or intended for such person and divulges the same or the purport or substance thereof, except when lawfully authorized or directed to do so, shall be liable to the same penalty and imprisonment as are enacted in section 23 R.S. 1941, c. 298, s.4."

Consequently, being in a position to ascertain the similarity between the two articles it is possible to conclude that any reasoning relative to The Telephone Act of Ontario can apply mutatis mutandis to the Quebec Telegraph and telephone Companies Act. In other words, a difference of opinion could not be explained by a difference in

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the texts.

Judge Moore (5) wrote:

"The wording of this indictment would cover all three classes of wrongful acts. I conclude therefore that there are both statutory and common law prohibitions against the common purpose that was in the minds of Chapman and Grange on or about October 8, 1971, and that the purpose was unlawful."

Mr. G. A. Martin c.r., pointed to this assertion as incorrect and Judge Arnup rejects this premise by saying:

"The indictment in this case, however, does not, in my view, lend itself to this kind of treatment. As I have said earlier, it is obviously aimed at s. 112 of The Telephone Act it certainly does not invoke any unlawfulness by reason of breach of s. 25 of the Bell Telephone Act and, in my view, it is not aimed at a purpose unlawful at common law. I am not suggesting that an indictment based on the facts proved in this case, could not have been drawn in such a way as to enable the Crown at least to argue that the purpose was unlawful at common law, even if not a crime at common law. I am simply saying that that is not this case. The Crown chose to charge a conspiracy which was in my view founded solely on s. 112 of the Telephone Act.

This makes it unnecessary to consider further the suggestion of Mr. Campbell that eavesdropping was an "unlawful act" at common law (cf. Frey vs Fedor, 1950 S.C.R. 517, (1950) 3 D.L.R. 513, 97 C.C.C. 1), or whether eavesdropping constitutes "the tort of breach of confidence" "which Mr. Campbell, I think optimistically, described as a disputed area".

It follows also that I do not need to consider further the question of "public mischief, and conspiracy to commit it. This is not what these appellants are charged with doing.

My conclusion, accordingly, is that s. 112 of The telephone Act is valid legislation; and agreement to contravene it, either in the sense of depriving persons entitled to its protection of the civil right which that section gives them, or to contravene the section merely by doing what is prohibited on terms of penalty, is an agreement to effect an unlawful purpose."

I understand thereby that any attempt to violate the mentioned Article 112, be it by generally depriving individuals of their right as implicitly granted to them by the said article (the private

character of the communication) or by presenting one or any of the specifically forbidden acts, is an attempt that carries an "unlawful purpose" and consequently becomes a conspiracy in the sense of Article 423 (2) of the Criminal Code.

However, the mentioned Article 112 stipulates one or more exceptions by the use of the words: "except when lawfully authorized or directed to do so."

The Chapman case does not show that allegedly Chapman in the course of his official duties as constable had been legally authorized or ordered to act in that manner.

If Judge Arnup arrives at the conclusion that there was "an agreement to effect an unlawful purpose" he implicitly sets aside the possibility of recourse to the exception stipulated in Article 112 and it is justified, in my opinion, in view of Grange's remark that "this would keep the company (without any reference to Redpath Sugars' where the strike had not yet started) ahead of the unions as far as knowing what would be happening."

If I examine the evidence presented before me, I must remind myself that the motive that led Patenaude to authorize the "VEGA" operations can be easily distinguished and that it is undoubtedly the same that led the legislator to adopt Article 178.12 of the Criminal Code.

This information by Patenaude appears on page 15 of his testimony.

After considering the decision of Judge Arnup, I do not believe that the Chapman opinion can be applied here. It is true that in both cases officers of the police force are involved, but their motive is undoubtedly different and if the mentioned Article 112 stipulates one or more exceptions, it is, in my opinion, foreseeing a situation such as has been shown by the facts presented as evidence

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before me.

COPELAND and ADAMSON ET AL:

To respond to the previously posed question with regard to the lawfulness or unlawfulness of wire-tapping, I have read, with great interest, the case of Copeland and Adamson et al (6) where Judge Grant of the Ontario High Court of Justice on April 19, 1972 had to rule on a petition to issue a writ of mandamus and prohibition compelling the Chief of Police and of the Board of Commissioners of Police of Metropolitan Toronto to order the members and civil servants of the Metropolitan Toronto Police Force to cease and discontinue all forms of wire-tapping.

The petitioner is an attorney exercising his profession in a firm in Toronto. On January 7, 1971, though not alleging that he is the target of such surveillance, he called upon the Board of Commissioners of police to cease such practices and in response they issued him a copy of a resolution adopted in March of 1969 which states the grounds that mandate the use of that method of surveillance and the special circumstances under which it is permitted.

The petitioner cites Article 112 of The Telephone Act (R. S.O. 1970, c.457) in support of his claim which says:

"Every person who, having acquired knowledge of any conversation or message passing over any telephone line not addressed to or intended for such a person, divulges the purport or substance of the conversation or message, except when lawfully authorized or directed so to do, is guilty of an offence and on summary conviction is liable to a fine of not more than \$50.00 or to imprisonment for a term of not more than 30 days, or to both."

Likewise, he cites, as did the complainant before me, Article 25 of the Act to incorporate The Bell Telephone Company of Canada (1880 - Can. c. 67) which says:

(6) Reported in 7 C.C.C. (2nd s.) page 393

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"Any person who shall willfully or maliciously injure, molest or destroy any of the lines, posts or other material or property of the Company or in any way willfully obstruct or interfere with the working of the said telephone lines, or intercept any message transmitted thereon shall be guilty of a misdemeanor."

Judge Grant also summarized the issue:

"I am considering on this motion only whether the Court should, as the law now stands, restrain the Chief of Police and the Board of Commissioners of Police for Metropolitan Toronto from using audio-surveillance in the course of their duties in those cases where the Chief of Police has given his approval after being of the opinion that there is reasonable and probable cause to believe that a criminal offence has been or is about to be committed."

The learned Judge makes a useful distinction between "an alleged recognition of public duty to excuse breach of the criminal law by police officers" on the one hand, and "the justification which the Criminal Code prescribes to officers where they are proceeding to enforce the law."

In reading the testimony of Patenaude and Lavallee I can only repeat mutatis mutandis the intention of Judge Grant:

"The material before me only indicates that audio-surveillance is being used by the police in Metropolitan Toronto in the manner prescribed by such policy statement of the Board. This establishes that such equipment is used only with the approval in each case of the Chief of Police granted only when in his opinion there is reasonable and probable cause to believe that a criminal offence has been or is about to be committed. As the law now stands, such interception by a police officer, in my opinion, does not amount to an offence against 112 of The Telephone Act (Ontario) for the reasons set out above."

As to Article 25 of the Act to incorporate The Bell Telephone Company of Canada I fully concur with the following remarks made by Judge Grant:

"The only part of such section which it might be said would be breached by wire-tapping would be the words "interfere" or "intercept". Can it be said that listening in on a telephone conversation is properly described by either of such terms? The Shorter Oxford English dictionary defines the word "interfere" as follows:

"to interpose - intersperse; to strike against each

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other; to come into collision; to exercise reciprocal action so as to increase, diminish or nullify the natural effects of each."

It defines the word "intercept" as follows:

"to take or seize by the way or before arrival at a destined place; to stop or interrupt the progress or course of; to interrupt communications or connections with."

I do not believe that wire-tapping which does not impede the conversation between the parties nor impede its progress can form a breach of such section because the material before me does not indicate that the audio-surveillance creates any disturbance of the conversation."

Even if Article 1612 of the Civil Code establishes "a civil remedy for invasion of privacy" (7) its purpose is not to confer a right that is legally applicable to the confidential use of a private telephone line even in the case of a "ring down circuit". The Civil Code does not institute the right to privacy or secrecy in conversation per se, it does not exist.

R. vs PEARSON:

It was Judge Dohm who wrote:(8)

"There is no law in Canada at the present time prohibiting the use of recorded evidence obtained by wire-tapping, as was done here. In my opinion, there is no violation of the Canadian Bill of Rights, 1960, ch.44, as one counsel urged."

I am perfectly aware that prior to June, 1974 there were in this regard two related problems which often interacted; first, the one of admissibility into evidence of private conversations monitored by means of modern methods of wire-tapping (9); and then the one of the lawfulness (or unlawfulness of some) of these interceptions.

(7) Aforementioned COPELAND AND ADAMSON

(8) R. vs Pearson (1968) 66 W.W.R. 380 (381-2)

(9) Electromagnetic, acoustical, mechanical or other device (178.1 cr.c)

A 2853

Wherefrom the need, having recourse to the jurisprudence, to bear in mind this distinction since the only problem I have to solve is the legality or illegality.

Aware of this distinction it is still, in my opinion, very interesting to learn the opinions of Judges Martin and Bisson in this regard.

* * *

R. vs BARTON ROY LESAGE:

On September 26, 1974, Judge Martin (10) was called upon to rule on the advisability of a voir-dire for the purpose of introducing wire-tapping evidence. The defense objected pursuant to Article 178.6 of the Criminal Code.

Judge Martin made the following ruling:

"Since section 178.16 (1) appears substantially to be a procedural provision, should it be given in the circumstances a retrospective operation? The answer to this question, in my view, depends in part upon whether wire-tapping was illegal prior to June 30, 1974."

And further on he answers that question as follows:

"By virtue of the foregoing authority for the purposes of the criminal law in the circumstances of this case, audio-surveillance or wire-tapping was not per se illegal prior to June 30, 1974."

And then in conclusion he adds:

"As wire-tapping was not, in my judgment, illegal in the circumstances existing in this case, the instant case, prior to the coming into force of the Protection of Privacy Act."

* * *

R. vs DESJARDINS AND ANUAU

More recently, on October 18, 1974, Judge Bisson (11) was called upon to rule on similar circumstances.

(10) (Illegible)

(11) R. vs Desjardins and Anau, C.B.R. 74-9150

A 2854

He wrote in pages 3 and 4 of his decision:

"Initially, it is appropriate to note that if the legislator established a crime in paragraph (1) of Article 178.11 it is not a matter, if one could say so, of an absolute crime since no crime exists if, on the one hand, the intercepted person gives his consent or if, on the other, authorization was duly obtained from competent authorities."

"Furthermore, it must be recognized that prior to June 30, 1974 the non-authorized interception of a telephone conversation did not constitute a crime."

I go further with this reasoning by ruling that:

"It must be noted that in the text of Article 178.16 (1) the legislator did not say that only communications that had been intercepted pursuant to chapter 50 could be admitted into evidence.

If he had made that ruling, one would be able to maintain that the legislator had indicated that he believed that the communications intercepted prior to the date when the law came into effect, June 30, 1974 would be inadmissible thereafter."

I believe I must share his opinions.

It is necessary to add that no indication of guilty mens rea emerges from Patenaude's and Lavallee's testimony. Where is the animus furandi required for the theft of telecommunications? Where is the guilty intent necessary for the malfeasance? On the contrary the acts presented were in the greatest interest of Justice. At the risk of seeming superfluous I will venture to say that if a subscriber's line has been used for verification purposes and if some wires sustained superficial cuts, the Roman saying of "ne minimis non curat lex" applies in this case.

Consequently, after close examination of the law I conclude that it is not necessary to continue with the preliminary hearing accumulating further details relative to the facts in the complaint.

Furthermore, I must reject the complaint of the complainant, Mrs. Marguerite Dasti against Herve Patenaude and Claude Lavallee and declare that there are insufficient grounds for me to be able to pursue them any further in accordance with either one of the provisions

A 2855

of Article 455.3 of the Criminal Code.

December 23, 1974

ANDRE DURANLEAU, J.C.S.P.

Note: Translation begins at page A-2888

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CANADA

PROVINCE DE QUEBEC

DISTRICT DE MONTREAL

C O U R S U P E R I E U R E
(chambre criminelle)

Ce 27 mars 1975

C.S. no 38-4-75

PRESIDENT: L'HONORABLE G. DESLANDES

DAME MARGUERITE DASTI,

requérante

vs

MONSIEUR ANDRE DURANLEAU, Juge de
la Cour des Sessions de la Paix, ès-
qualité de Juge de Paix aux termes
de la Partie XV du Code criminel,

intimé

J U G E M E N T

La Cour, ayant entendu les parties
par leurs procureurs respectifs sur le mérite de la présente
cause, examiné la procédure, les pièces produites, entendu la
preuve, et sur le tout mûrement délibéré, statue comme suit:

Il s'agit d'une requête en "mandamus"
dont les conclusions sont les suivantes:

"POUR CES MOTIFS,
PLAISE A VOTRE SEIGNEURIE ET CETTE HONORABLE
COUR:
ACORDER la présente requête;
ENETTRE une ordonnance MANDAMUS ENJOIGNANT
ET ORDONNANT à l'intimé Monsieur ANDRE
DURANLEAU, Juge des Sessions de la Paix et
Juge de Paix aux termes de la Partie XV de

"Code Criminel, d'émettre conformément à l'article 455.3 du code criminel, les sommations requises par les plaintes et dénonciations de la requérante, MARGUERITE DASTI, assermentées par l'intimé à Montréal, le 12 décembre 1974 contre les personnes dénoncées, messieurs Hervé Patenaude et Claude Lavallée, les inculpant des infractions y décrites et déclarées:

OU SUBSIDIAIREMENT

EMETTRE UNE ORDONNANCE MANDAMUS ENJOIGNANT ET ORDONNANT d'appliquer auxdites plaintes et dénonciations, à la preuve déjà reçue, à celle à être reçue et aux personnes dénoncées les Lois du Canada et de la Province de Québec selon les directives en Droit que cette Honorable Cour et Votre Seigneurie sont respectueusement priées de lui donner, pour qu'il soit sur le tout décidé ce qui appartient en Droit et Justice; Le but aux conditions qu'il plaira à cette Honorable Cour de fixer."

A. LES FAITS:

Le 12 décembre 1974, la requérante se portait dénonciatrice et déposait devant l'intimé deux dénonciations identiques contre deux officiers de police, comportant chacune dix (10) chefs d'inculpation; chacun des dix (10) chefs de chaque dénonciation reprochait à l'un d'avoir conspiré avec l'autre et à l'un et l'autre d'avoir conspiré avec d'autres personnes.

Le premier chef reprochait à l'un d'avoir conspiré avec l'autre et d'autres personnes dans le but de commettre un acte criminel, soit des vols de télécommunications, cet acte criminel étant prévu à l'article 287-1-b du code criminel; article 423(1)(d) du code criminel.

Les chefs 2, 3 et 4 reprochaient à l'un d'avoir conspiré avec l'autre et d'autres personnes dans le but de commettre un acte criminel, soit un méfait, et particulièrement prévu à l'article 387(1-c et 4-a) du code criminel, les victimes de ces méfaits étant désignées dans chacun de ces trois (3) chefs: article 423(1)(d) du code criminel.

* MÉFAIT
P.W.

Le chef numéro 5 reprochait à l'un d'avoir conspiré avec l'autre et d'autres personnes dans le but de commettre un acte criminel, soit un méfait, et particulièrement le méfait prévu à l'article 387-1-a et 4-a du code criminel: article 423(1)(d).

Les chefs 6, 7 et 8 reprochaient à l'un d'avoir conspiré avec l'autre et d'autres personnes dans le but d'arriver à une fin illégale, c'est-à-dire commettre trois (3) infractions prévues à l'article 25 de la loi incorporant "The Bell Telephone Company of Canada", 1880 Statuts du Canada ch. 67: article 423(2)(a) du code criminel.

Le chef numéro 9 reprochait à l'un d'avoir conspiré avec l'autre et d'autres personnes dans le but d'arriver à une fin illégale, soit commettre l'infraction prévue à l'article 24 de la loi "The Quebec Telegraph & Telephone Companies Act, R.S.Q., 1970, c. 286: article 423(2)(a) du code criminel.

Le chef numéro 10 reprochait à l'un d'avoir conspiré avec l'autre et d'autres personnes dans le but de poursuivre une fin légale par des moyens illégaux dans le sens que ces moyens sont contraires aux articles 287(1)(b), 387(4a) en relation avec 387(1)(a) et (c) du code criminel, à l'article 25 de la loi incorporant "The Bell Telephone Company of Canada" 1880 Statuts du Canada, ch. 67, et à l'article 24 de la loi "The Quebec Telegraph & Telephone Companies Act", R.S.Q. 1970 C. 286.

Après avoir assermenté les dénonciations le 16 décembre 1974, le juge de paix procéda à une "pré-enquête" suivant les dispositions de l'article 455.3 du code criminel.

Au cours de cette pré-enquête, Madame Dasti a d'abord été entendue comme témoin: elle a déposé en preuve la transcription des témoignages donnés par Hervé Patenaude et Claude Lavallée devant le juge Jacob Mishler les 14 et 29 novembre 1974; par la suite M. Richard Croteau, inspecteur chef de Bell Canada et M. Bernard Couture de la Sûreté du Québec ont été entendus.

Au terme de la pré-enquête le juge de paix a rendu sa décision le 23 décembre 1974, décision qui se termine ainsi:

"Par conséquent, après analyse du droit, je conclue (sic) qu'il n'est pas nécessaire de continuer la pré-enquête en accumulant des précisions additionnelles quant aux faits dénoncés;

Que de plus, je dois rejeter les plaintes de la dénonciatrice Dame Marguerite Dasti contre Hervé Patenaude et Claude Lavallée en les déclarant mal fondées pour qu'il me soit permis de leur donner suite, suivant l'une ou l'autre des formes prescrites à l'article 455.3 du code criminel."

B. LES PRETENTIONS DE LA REQUERANTE:

Par sa requête devant la Cour du Banc de la Reine, la requérante demande l'émission d'un bref de "mandamus" contre l'intimé suivant les conclusions alternatives récitées au tout début du présent jugement.

Par sa requête en "mandamus", la requérante allègue généralement des erreurs de droit et ces allégations générales s'appliquant à l'ensemble de la décision du juge de paix constituent le paragraphe 9 de la requête:

A 2860

"9. Il est respectueusement soumis que le jugement rendu est vicié dans son ensemble, quant à tous et chacun des chefs d'inculpation de l'une et l'autre dénonciation et plainte, des erreurs de droit suivantes:

a) le refus ou omission d'appliquer aux offenses reprochées, à la preuve faite et aux personnes dénoncées ainsi qu'à celle désignées comme co-conspirateurs le principe selon lequel l'individu est censé vouloir la conséquence de ses actes;

b) l'imposition à la poursuite du fardeau d'établir par une preuve indépendante le "mensrea" des personnes dénoncées;

c) l'application aux actes, faits et gestes mis en preuve des dispositions protectrices de l'article 25-1 du code criminel sur l'interprétation, la portée et l'application duquel le savant intime s'est mépris;

d) une auto-instruction erronée quant à l'existence en droit d'une défense de justification de la commission des offenses reprochées bénéficiant spécialement et spécifiquement disponible aux officiers de police ainsi que quant à la nature, la valeur et la portée juridique de cette défense;

e) une conception fausse des droits et prérogatives des officiers de police différenciant ceux-ci du commun des mortels et les exemptant de l'application générale de la loi et ce en l'absence des lois, statuts, règlements ou arrêtés-en-conseil ou ordre exécutif légitime décrétant, promulguant, ordonnant ou autorisant telle exemption ou exception;

f) une prétention mal fondée reconnaissant aux policiers le droit et le pouvoir de s'autoriser eux-mêmes et/ou les autres, et ce en l'absence de lois, statuts, règlements ou arrêtés-en-conseil ou ordre exécutif légitime permettant de leur accorder ou leur accordant généralement ou spécialement ces droit, pouvoir ou permission de violer la Loi générale de la province ou du pays;

g) une application inadmissible du principe non moins inadmissible que la fin justifie les moyens;

h) une interprétation injustifiée de la Loi contraire à la Déclaration Canadienne des Droits en ce qu'elle prive les citoyens du droit à l'égalité de la Loi;

i) la substitution du juge de paix au jury dans l'appréciation d'une telle défense de justification si elle existe;

j) une interprétation illégale de la Loi qui va à l'encontre de la Déclaration Canadienne des Droits en ce qu'elle ne reconnaît pas le droit du citoyen de ne pas être privé de la jouissance légitime d'un bien autrement que par l'application régulière de la Loi (due process of Law);

A 2861

"k) une interprétation illogique de la Loi selon laquelle les policiers auraient le pouvoir de s'accorder eux-mêmes des droits, pouvoir, privilèges et permissions que l'autorité judiciaire elle-même n'a pas le pouvoir de conférer."

La requérante allègue spécialement des erreurs de droit du juge de paix relativement à chacun des chefs d'inculpation: ce sont les paragraphes 10, 11, 12, 13, 14, 15, 16, 17 de la requête:

"10. Il est respectueusement soumis que relativement au 1er chef de chacune des dénonciations, le savant juge de paix a commis les erreurs de droit énumérées au paragraphe 9 ci-dessus et a de plus erré en droit en:

- a) interprétant l'article 287-1-b en tenant compte de l'en-tête et des notes marginales plutôt que du texte même de l'article;
- b) interprétant ledit article comme s'il était rédigé dans les mêmes termes que l'article 283 et comportait les mêmes éléments essentiels que celui-ci;
- c) imposant à la poursuite le fardeau d'établir par une preuve indépendante et spécifique l' "animus fuandi" des personnes dénoncées;

11. Il est respectueusement soumis que concernant les chefs d'inculpation numéros 2, 3 et 4 qui ne diffèrent entre eux que par le nom des victimes, le savant intimé a erré en droit:

- a) de la façon décrite au paragraphe 9 ci-dessus;
- b) en interprétant comme il l'a fait l'article 387-1-c du code criminel;

12. Il est respectueusement soumis, qu'en relation avec le chef d'inculpation numéro 5, le savant juge de Paix a erré en droit: en

- a) interprétant comme il l'a fait l'article 387-1-a du code criminel;
- b) appliquant à cette offense la maxime "De Minimis non curat Lex";
- c) faisant les erreurs de droit décrite ci-haut au paragraphe 9;

13. Il est respectueusement soumis qu'en ce qui concerne le chef d'inculpation numéro 6, bien que l'entente entre les personnes dénoncées eut été prouvée et que la preuve eut été faite de ce que les lignes, le matériel et/ou la propriété de Bell Canada avaient été volontairement endommagés et/ou dérangés malgré que l'article 25 de la Loi pour incorporer la Compagnie de Téléphone Bell du Canada soit encore en vigueur, le savant juge ne rendit pas jugement, à moins que sa décision n'ait été implicitement comprise dans celle qu'il rendait sur les chefs numéros 5 et 8, auquel cas elle est entachée des mêmes erreurs que le jugement rendu sur ces derniers;

soumis (TA)
(TA)

"14. Il est respectueusement ~~que~~ par rapport au chef d'inculpation numéro 7, le ~~savant intime~~, bien que l'entente fut prouvée et qu'il eut été établi que volontairement des lignes téléphoniques avait été entravé et/ou dérangé contrairement audit article 25 de ladite Loi par les personnes dénoncées; le savant intime ne rendit pas de décision à moins qu'elle n'ait été implicitement comprise dans son jugement sur les chefs 5 et 8, auquel cas les mêmes erreurs de droit affectent également ladite décision;

15. Il est respectueusement soumis que relativement au chef d'inculpation numéro 8, le savant Juge de Paix, en sus des erreurs de Droit énumérées au paragraphe 9 des présentes, a aussi commis une erreur de droit dans ses interprétation et application dudit article 25 de ladite loi en attribuant au mot "interception" un sens et une portée restreints de façon injustifiée, contraire au langage courant, à l'usage, à l'interprétation judiciaire générale et à l'encontre des règles d'interprétation des statuts;

16. Concernant le 9ième chef d'inculpation, il est respectueusement soumis que le savant intime a erré en droit de la façon décrite au paragraphe 9 ci-dessus et qu'il a au surplus erré dans son interprétation du mot "autorisation" tel qu'employé dans le texte de la loi provincial invoquée et plus spécialement à l'article 24 de ladite loi;

17. En refusant l'émission des sommations requises par le 10ième chef d'inculpation le savant Juge Duranleau a erré en droit de la façon indiquée au paragraphe 9 des présentes et au surplus a erré en droit en interprétant l'article 423-2-b du code criminel de telle façon que les fin et but licites, légitimes, voire même louables, recherchés constituent une fin de non-recevoir à l'accusation, ce qui équivaut à toutes fins pratiques à l'abolition et l'abrogation de cette disposition législative."

La requérante fait donc fondamentalement reposer sa requête en "mandamus" sur, selon ses prétentions, des erreurs de droit du juge de paix.

En premier lieu, c'est le sens des allégations des paragraphes 18 et 19 de la requête:

"18. Votre requérante soumet respectueusement qu'en l'absence des erreurs de droit ci-haut alléguées, elle n'aurait pas été privée de ses droits et privilèges de citoyenne de faire passer en justice les personnes dénoncées;

"19. Votre requérante représente avec déférence que les faits déjà mis en preuve justifiaient en droit l'émission des conclusions requises ou tout au moins la continuation de la réception de la preuve une fois réglées conformément à la loi les questions de droit et que les erreurs de droit invoquées ont affecté matériellement et essentiellement l'exercice de la considération et de l'appréciation de la cause par l'intimé, influencé indûment son opinion et l'ont empêché d'exercer judicieusement et judiciairement sa discrétion."

En second lieu, lors de l'audition le procureur de la requérante a formulé la proposition suivante: "en se dirigeant mal sur le droit, le juge de paix s'est privé de sa juridiction; en se dirigeant mal sur le droit, il s'est mis forcément dans la position de ne pouvoir légalement et judiciairement exercer sa discrétion".

C. LE MANDAMUS FACE AUX PRETENTIONS
DE LA REQUERANTE:

Il convient, en premier lieu, de se demander si le recours en "mandamus" est ouvert à la requérante en prenant pour acquis qu'il est avéré que le juge de paix s'est mal dirigé en droit.

Le "mandamus" est le remède employé pour forcer un juge d'une Cour inférieure ou un officier de Justice en général à accomplir ses fonctions judiciaires.

Le recours en "mandamus" existe donc pour forcer un juge d'une Cour inférieure d'accomplir son devoir, s'il refuse de le faire; mais si le devoir est accompli le recours en "mandamus" n'est pas ouvert nonobstant le fait que la décision est incorrecte, et aucune Cour Supérieure ne peut renverser ou modifier telle décision, ou ordonner au premier juge d'en arriver à une conclusion différente, sauf le cas de circonstances réellement exceptionnelles, comme par exemple le préjugé, le "bias", l'intérêt personnel ou la malhonnêteté.

A 2864

La question qui se pose, en matière de "mandamus" est de savoir si le tribunal inférieur a refusé d'exercer la discrétion qu'il doit exercer, et dans ce cas il peut être forcé, par "mandamus" d'exercer sa juridiction, ou si, d'autre part, il a exercé sa juridiction et en est venu à une décision ou conclusion, auquel cas, le "mandamus" n'est pas le remède, quelque erronée que puisse être la décision ou conclusion.

Ces principes semblent bien établis par la doctrine et la jurisprudence:

- 1- Tremecar's Criminal Code, 5e édition, p. 1595
(6e édition, p. 1427):

"The question which usually arises in such cases is whether the inferior tribunal has declined to exercise a discretion which it should exercise, in which case it can be compelled by mandamus to exercise its jurisdiction, or whether, on the other hand, it has exercised its jurisdiction and come to a conclusion, in which case mandamus is not a remedy, no matter how erroneous the conclusion may be."

- 2- Short & Mellor, "The Practice of the Crown Office"
2e édition, page 198:

"Where any tribunal, inferior Court, or body of persons charged with the performance of a public duty do not discharge that duty, mandamus lies to compel them to do it."

page 200:

"The question is not whether the tribunal has been right or wrong in the result of the exercise or their discretion, either upon the law or upon the facts, but whether it has in fact exercised it."

page 206:

"Whether a magistrate has come to a right conclusion or not, either on the law or the facts, cannot be inquired into on mandamus, but only whether he has adjudicated; but it must be an adjudication within his jurisdiction and according to law."

- 3- Salhany, "Canadian Criminal Procedure", 2e édition, pages 311 et suivantes.

A 2865

4- Evans v. Pesce and Attorney General of Alberta,
 8 C.R.N.S., page 201:

Il s'agit d'un jugement du juge Riley
 de la Cour Suprême de l'Alberta:

"The law respecting the same has been well established over the years and can be summarized on the basis that any inferior court or board or person may be required to perform his duty if he refuses to do so, but if the duty is performed in any matter judicial in nature, certiorari and/or mandamus will not lie regardless of whether an incorrect decision is reached and no superior court can reverse or alter any decision or direct the inferior court to come to a different decision, save in such exceptional circumstances as prejudice, bias, personal interest, dishonesty or the like.

.....
 Mandamus cannot lie with respect to the magistrate performing his duties, as all he is required to do under the Code, is hold a hearing, fairly listen to the representatives of the applicant, and then within the discretion granted to him, come to a determination. The magistrate cannot be required by mandamus to hold another hearing for he has already properly held one.

Mandamus cannot lie to require the magistrate to issue a summons or warrant, for such is a matter that is wholly within his discretion. Even if the magistrate were to make an erroneous determination on the law in exercising that discretion, mandamus cannot lie."

Dans cette cause de Evans, le juge
 Riley cite un très grand nombre d'arrêts:

Dans les arrêts cités dans Evans, il
 convient sans doute de relever les suivants:

a) R. v. Parke, (1899), 30 O.R. 498, 3 C.C.C. 122:

"It was the duty of the police magistrate, upon receiving the information, to hear and consider the allegations of the informant, and if of the opinion that cause for issuing a warrant or summons was not made out, to refuse it. And, having so acted this Court has no jurisdiction over him. It is his judgment, not mine nor that of any other Judge or Court, which is to be exercised under section 599 of the Criminal Code."

- b) Broom v. Denison, (1911) 20 O.W.R. 30, 3 O.W.N. 51, 18 C.C.C. 254 (sub nom. Re Broom) (affirmed 20 O.W.R. 244, 3 O.W.N. 102, 18 C.C.C. 255):

"The magistrate's discretion in issuing or refusing to issue a summons is not subject to review in this Court."

- c) Blacklock v. Primrose, (1924) 3 W.W.R. 189, 42 C.C.C. 125:

"The authorities seem quite clear that if the Magistrate has limited the ambit of his inquiry when arriving at an opinion on alleged facts disclosed in the allegations of the complainant, this Court has no jurisdiction to interfere although it may disagree with the conclusion both of facts and law which the Magistrate arrived at."

- d) Marsil v. Lanctôt, (1914), 20 R.L.N.S. 237, 25 C.C.C. 223, 28 D.L.R. 380:

"As a matter of principle, one cannot take action by way of mandamus against a magistrate to have him render one decision rather than another; that would be to make this Court a Court of Appeal by way of mandamus from those decisions, which jurisdiction certainly does not exist in our law; moreover it would be to interfere with the discretion which is left to him by the above mentioned article (now Code s. 440). The respondent simply answered at first that, in the exercise of his discretion, he had not thought fit to issue the warrant for various reasons orally given at the hearing. I think that we could stop there and decide that there is no reason for the privileged remedy of mandamus for the varying of that judgment."

- e) Thompson v. Desnoyers, (1899), 16 Que. S.C. 253, 5 R. de Jur. 405, 3 C.C.C. 58:

"I do not express any opinion upon the merits of the case. The magistrate has upon him the entire responsibility of refusing the warrant. All I say is that a mandamus cannot lie because it has not been shown that he has omitted, neglected or refused to perform his duty...and that even if I did appreciate the allegations of the complainant and the evidence differently from him this would not justify my interference."

- f) Ex parte Evans, (1894) A.C. 16:

"But the Court of Queen's Bench refused to interfere by mandamus. They said: The Justices have heard and determined it; here is the record; here is the determination. They may have gone wrong, but if they determined it wrongly, we cannot interfere upon this application."

- g) Charleston Assessment, (1915), 21 B.C.R. 281, 8 W.W.R. 930, 22 D.L.R. 240 (sub nom. Charleston v. Byrne):

"It is settled law that where there is cast upon any authority a duty of a public nature, that duty must be discharged, and in default recourse may be had by way of mandamus to compel its performance, yet it is to be well remembered that it is only in the case where the inferior tribunal clothed with jurisdiction to hear and determine the matter has failed to exercise the jurisdiction, that this remedy may be invoked, and when granted it cannot be in the way of directing that the jurisdiction be exercised in any particular manner, that is, mandamus is only available where it is plain that there has been no exercise of the jurisdiction conferred."

- h) Fletcher v. Wade, (1919) 2 W.W.R. 1 at p. 2, 45 D.L.R. 91:

"The Court of Revision is a judicial body and this Court cannot review its proceedings in the sense of inquiring into the correctness of the Court's conclusions. If mandamus will lie at all to a Court of Revision (which in the result I do not need to determine) it will only lie when it is made to appear that the Court has not heard and determined the complaint: when it has either expressly or virtually declined jurisdiction. If the Court of Revision in good faith entertained the respondent's appeal and adjudicated upon it, there can be no inquiry here as to the correctness of its decision. We cannot sit as a Court of Appeal to review its proceedings."

- i) Rex v. Neff, 3 C.R. 89, (1947) 1 W.W.R. 640, 88 C.C.C. 199:

"The question which usually arises in such cases is whether the inferior tribunal has declined to exercise a discretion which it should exercise, in which case it can be compelled by mandamus to exercise its jurisdiction, or whether, on the other hand, it has exercised its jurisdiction and come to a conclusion, in which case mandamus is not a remedy, no matter how erroneous the conclusion may be."

- j) Re Ault; Ault v. Read, (1956), 24 C.R. 260, 18 W.W.R. 438 (headnote):

"Where a police magistrate in the proper exercise of his discretion has decided a matter within his jurisdiction mandamus does not lie to compel him to reconsider it, however wrong that decision may be."

- 5- Re Blythe and the Queen, 13 C.C.C. (2d ed.) 192:

Dans cette cause, une requête en

"mandamus" a été accordée; le juge Monroe de la Cour Suprême de l'Alberta explique ainsi sa décision:

"He (Counsel for the Crown) also submits that this Court is without jurisdiction to grant the application because the Justice of the Peace has exercised his discretion and has made an adjudication and mandamus does not lie, there being no appeal therefrom even if this Court does not agree with his conclusions: R. v. Jones, (1970) 2 C.C.C. 374; R. v. Coughlan, Ex p. Evans, (1970) 3 C.C.C. 61, 8 C.R.N.S. 201, 70 W.W.R. 321 sub nom. Evans v. Pesce. That is so if the adjudication was made according to law, that is, if the discretion was exercised judicially following a proper hearing, but the reasons given by the Justice of the Peace herein do not indicate whether or not he believed the witnesses who testified before him and made a decision based thereon, or whether he was governed by extraneous considerations which prevented him from conducting a hearing upon the merits. In those circumstances, I think it proper to remit the matter to the Justice with a direction that he review the matter and consider all proper evidence and render his decision as to whether or not a case has been made out to indicate that there are reasonable and probable grounds for believing that the constable has committed one or both of the offences referred to in the information; and I so order."

6- Re Lapinsky, 47 C.R.:

La requête en "mandamus" a été rejetée, le juge J. Brown, de la Cour Suprême de la Colombie-Britannique, s'exprime ainsi:

"From the above it will appear that, like counsel, I deplore the decision made by the learned magistrate. But this is mandamus and the Court does not act merely if a judicial official sought to be coerced by the writ is wrong."

Dans ce jugement, le Juge Brown cite l'arrêt Rex v. Hauna and McLeon, 57, B.C.R. 52, 1941, 3 W.W.R. 73 et spécialement l'extrait suivant des notes du juge A. McDonald, et sur ce point le Juge McDonald a l'assentiment de ses deux (2) collègues de la Cour d'Appel de la Colombie-Britannique:

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"I think it is clear that mandamus is a remedy to compel the exercise of jurisdiction by a tribunal that has refused to exercise it; and when we speak of an inferior court having exceeded its jurisdiction we simply mean that there is a lack of jurisdiction pro tanto. When a Court has entered upon a case and has given a decision, however outrageous, it seems to me impossible to say it has refused jurisdiction. To take that course is simply to sit an appeal on a tribunal and to make mandamus another form of appeal. Although, as stated above, Courts have often taken that course, I think that on the weight of authority it cannot be justified. In order to justify awarding a mandamus to a county court judge who has given a judgment, however absurd, the Court must say that his judgment is no judgment, but a complete nullity. There is, however, very high authority to show that a judgment cannot be treated as a nullity merely because the tribunal below has held no proper hearing and has refused to hear of considerable evidence. In my opinion the County Court judge had jurisdiction to enter upon the hearing of this appeal; he did enter upon it; he was entirely wrong, I think, in the course he took, for the plain intention of the Criminal Code is that he ought to have tried the case on the merits. Nevertheless, I have concluded that Robertson J., for the reasons given in his judgment and on the authorities above mentioned, was right in holding that he was powerless to compel the judge in those proceedings to do otherwise than he has done."

Le jugement dans Lapinsky réfère à un autre jugement de la Cour d'Appel de la Colombie-Britannique: il s'agit de l'arrêt R. v. Judge of the County Court of Westminster, 57 B.C.R. 70, (1941) 3 W.W.R. 557, 76 C.C.C. 325, (1941) 4 D.L.R. 641; dans cette cause, un "mandamus" avait été accordé pour obliger un juge de la Cour de Comté à entendre un appel en matière de convictions sommaires, après que ce même juge eût refusé d'entendre cet appel au motif qu'il n'avait pas juridiction.

7- Rex v. County Judge of Frontenac, Re McLeod and Amiro, 25 C.C.C. 230:

"No doubt, the High Court of Justice, exercising the powers of the traditional Court of King's Bench, may by mandamus command an inferior Court to hear a case within the jurisdiction of that Court. But where such Court has decided a matter within its jurisdiction, however wrong that decision may be, mandamus does not lie to compel a reconsideration."

- 8- Deux arrêts doivent être signalés; les faits qui ont donné lieu à ces décisions s'apparentent à la situation dans la présente affaire: il s'agit des arrêts suivants:
R. v. Jones, 1970, C.C.C. vol. 2, p. 374
Re Pokor, 4 C.C.C. (2nd) p. 177:

Dans l'arrêt Jones, le magistrat avait "reçu" une dénonciation, mais avait refusé d'émettre un mandat; par "mandamus", on demandait qu'un ordre lui soit donné d'émettre un mandat; sur ce premier point, le Juge Ruttan de la Cour Suprême de Colombie-Britannique, dit:

"I pause here to note that this Court cannot in any event direct the Magistrate to issue a warrant as the informant has requested by his motion. This Court may only direct the Magistrate to hear the matter again and consider all proper evidence and render his decision. If on a rehearing he comes to the same conclusion after a proper hearing of the evidence, even though he may err in his conclusion in law or fact, that is no ground for a mandamus."

Puis le juge Ruttan continue:

"It cannot be denied that Magistrate Jones in the present case entered on a hearing of all the evidence submitted ex parte before him and he made a ruling as to his conclusions from that evidence. He noted that the young lady had been unlawfully detained and that the officer had done so illegally. He went further and held that the further ingredient of this crime, i.e. criminal intent, had not been established either by the evidence submitted or from any inference to be drawn from the evidence submitted.

Counsel for the informant submitted that once the illegal act had been shown to have been committed the intent is to be presumed and there is no burden upon the informant to establish the ingredient of criminal intent. With respect I agree with the Magistrate that he can, if he so wishes, make a finding on the absence of the ingredient of criminal intent, whether or not there be any burden on the informant to do so, and may proceed on that basis to exercise his discretion. But whether I agree or not, is not material. The Magistrate may have erred in law or in fact, but I cannot control his discretion. He made a further comment on "mistake" and this may have been an improper conclusion to draw. But that comment was not necessary to the exercise of his discretion and did not govern his ruling. Even if it had done so, once again it is a conclusion the Magistrate may have drawn unlawfully from the evidence but a conclusion solely within his discretion and not to be challenged on mandamus.

"In reading my conclusion I have considered in particular the decision of Brown J., in *Re Regina v. Lapinsky*, (1966) 3 C.C.C. 97, 47 C.R. 346, 54 W.W.R. 559, and the authorities there referred to."

Dans l'arrêt *Bokor*, le juge de paix avait refusé de recevoir la dénonciation; le juge Galligan de la Haute Cour d'Ontario, s'exprime dans les termes suivants:

"Mr. Bokor contends that a Justice of the Peace has no right to refuse to receive an information from a person who wishes to lay charges of offences against the criminal law. He contends further that this refusal can be corrected by a mandamus. I quite agree with his contention in law and that mandamus does lie to compel a Justice of the Peace to accept an information."

Le jugement rendu par la Haute Cour de l'Ontario dans la cause *R. v. Justice of the Peace, ex parte Robertson*, 2 C.C.C. (2nd ed.) p. 416, se rapproche de l'arrêt *Bokor*.

9- La Cour a également consulté les arrêts suivants:

- *Re Regina and Carpenter*, 5 C.C.C. (2e éd.) 28
- *Re Adelphi Book Store vs The Queen*, 8 C.C.C. (2e éd.) 49
- *Re Chambers*, 13 C.R.n.s. 185
- *Re R. v. Grywacheski*, 3 C.C.C. (2e éd.) 339
- *Re Regina and Mann & al*, 4 C.C.C. (2e éd.) 319
- *R. vs Kurata*, 1970, 1 C.C.C. 90.
- *R. vs Keller*, 1971, 14 C.R.n.s. p. 234
- *R. vs Metropolitan Toronto Board of Commissioners of Police*
3 C.C.C. (2e éd.) 140
- *R. vs Doz*, 5 C.R.n.s. p. 86.

10- Regina vs Kipp:

Kipp avait été cité à son procès après une enquête préliminaire: au moment de son procès, son procureur avait présenté une requête en cassation de l'acte d'accusation au motif qu'il était nul parce que double (void for duplicity).

Le Juge Grant de la Haute Cour d'Ontario avait accordé un "mandamus" ordonnant au juge de la Cour de Comté de procéder au procès de Kipp sur l'acte d'accusation original: après avoir décidé que l'acte d'accusation n'était pas double (duplicity) le Juge Grant avait décidé qu'en cassant l'acte d'accusation, le juge de la Cour de Comté avait refusé d'exercer sa juridiction: 1963, 3 C.C.C. 72:

"With respect to the said learned County Judge, I find he was in error in so far as he held such indictment to be void for duplicity. The same is in clear and unambiguous language and therein charges the accused with only one offence, namely, that of selling as food dead animals. It is improper in determining the propriety of such charge, to import into the words of the indictment various interpretations thereof found in the definition section of the Regulations above referred to for the purpose of deciding whether it is duplicitous or not. The duplicity must appear in the words of the indictment as used in their ordinary and plain meaning."

"Mandamus will lie where an inferior Court declines jurisdiction because of a preliminary objection which is unfounded and which is based on mistake of law and the facts are not in dispute."

"This is not a case where the County Judge had accepted jurisdiction and quashed the conviction on grounds of law which appeared to him sufficient so to do but before the accused pleaded or any evidence had been heard he erroneously thought the indictment was void for duplicity and by quashing the same erroneously declined jurisdiction."

An order should therefore go setting aside the order of the learned County Court Judge by which he quashed the indictment and by way of mandamus directing him or some other Judge of the County Court Judge's Criminal Court for the County of Carleton to proceed with the trial of the accused on such indictment and to hear and determine the charge therein set forth."

La Cour d'Appel d'Ontario a maintenu la décision du juge Grant: 1964, 3 C.C.C. p. 13:

"In our opinion the indictment was not bad for duplicity. It charged one offence and one offence only."

"The learned County Court Judge had the jurisdiction to try the accused with that one offence thereby charged. In effect and in law he declined to exercise the jurisdiction thus vested in him because he erroneously held that the indictment was void for duplicity. In deciding on the preliminary matter he had not entered upon the trial of the accused on the merits. His decision did not involve the merits at all. A valid indictment was a sine qua non to the Judge exercising the jurisdiction vested in him. He erroneously held that the indictment was not valid and the sine qua non therefore non-existent. Mr. Justice Grant has so carefully dealt with the matters in issue that in our opinion it is unnecessary to say anything further."

La Cour Suprême du Canada a eu à se prononcer: 1965, 2 C.C.C. p. 133.

Les honorables juges Taschereau, Judson et Ritchie ont été d'avis de rejeter l'appel; les honorables juges Cartwright et Spence auraient maintenu l'appel.

L'honorable juge Judson parlant pour la majorité s'exprime ainsi:

"The appellant relies on *Re McLeod v. Amiro* (1912) 25 C.C.C. 230, 8 D.L.R. 726, 27 O.L.R. 232, *R. v. Justices of Middlesex* (1877), 2 Q.B.D. 516, and *R. v. Hanna and McLean* 77 C.C.C. 32, (1941) 4 D.L.R. 584, 57 B.C.R. 52 sub nom. *R. v. Junior Judge of the County of Nanaimo and McLean*. These are cases involving appeals from summary convictions which in the opinion of the reviewing Court were finally but erroneously decided on the merits. The cases merely hold that such decisions are not reviewable by way of mandamus. They do not touch the problem in the present case where an indictment is quashed before plea and no trial is held. All that the Crown is seeking is an order directing the County Court Judge to proceed with the trial. If he proceeds with the trial and gives a decision, that decision is open to appeal and is not reviewable on mandamus. But he can be compelled to give a decision on the merits and it is no answer to such an application to say that he has exercised his jurisdiction in quashing the indictment and such a decision cannot be reviewed.

^{TR.} The use of the word "jurisdiction" in this context does not help one towards a solution. There is no dispute that the Judge had the power to deal with the form of the indictment and that he was acting within his jurisdiction when he quashed the indictment. But he made an error in quashing this indictment. He was there to try the charge. As the matter

"stands now, unless the order of mandamus issues, the case as framed cannot be tried and it should be so tried. It is proper, in the circumstances, to issue the writ of mandamus. I approve of the reasons of Grant, J., on this point in their entirety (1963) 3 C.C.C. 72)."

L'honorable juge Cartwright dissident, s'attache d'abord à établir que, suivant lui, l'acte d'accusation était double et que la décision du juge de la Cour de Comté cassant l'acte d'accusation était bien fondée; il est de plus d'avis que même si la décision était mal fondée en droit, le recours en "mandamus" n'est pas ouvert.

L'honorable juge Spence partage l'opinion du juge Cartwright, tout en s'attachant plus à la proposition que le recours en "mandamus" n'est pas ouvert, le premier juge ayant accepté sa juridiction et l'ayant exercée, en accueillant une objection préliminaire, est d'avis également, comme le juge Cartwright, que l'acte d'accusation était double.

"In the present case, the Court accepted jurisdiction. It was an ordinary case of a trial of an indictable offence where there had been a proper commitment for trial on preliminary hearing. The trial Judge, Gibson, Co. Ct J., commenced the trial and as part of the legal merits of the case found that the indictment was void for duplicity.

.....
His decision was a decision upon the legal merits. Therefore, the learned County Court Judge having accepted jurisdiction and acted on it, mandamus to compel him to do his duty does not lie despite the fact that Grant, J., and the Court of Appeal for Ontario were of the opinion that he was in error in the performance of his duty.

.....
In the present case, I am of the opinion that the learned County Court Judge did not decline his jurisdiction but accepted it and that therefore no mandamus lies."

Sur l'absence de remède en cas de refus du "mandamus", l'honorable juge Spence continue:

"To the objection that this will result in there being no way of reviewing the allegedly erroneous decision of the County Court Judge, it must be pointed out that such result need not be fatal. As was said by Masten, J.A., at p. 74 C.C.C., p. 479 D.L.R., p. 248 O.R., in *R. v. Hansher and Burgess*, supra, the Crown is at liberty forthwith to lay a new indictment. *Boyd, C.*, in *Re Ratcliffe v. Crescent Mills & Timber Co.* (1901), 1 O.L.R. 331, said at p. 333:

"That the plaintiff has no right of appeal in this case under the Division Courts Act, may be a defect of legislation, but it does not enlarge the remedy by mandamus."

And in *High on Extraordinary Legal Remedies*, 3rd ed., p. 186, the learned author states:

"So when a court of appellate jurisdiction has dismissed an appeal, upon the ground that the act allowing appeals in such cases was unconstitutional and void, the writ will not go to compel the court to revise its actions and to reinstate the appeal. And this is true, even though the party aggrieved may have no other remedy to review the action of the court, since the absence of another adequate or specific remedy is not of itself ground for relief by mandamus."

L'arrêt Kipp établit donc la règle applicable dans la situation qui était alors soumise à la Cour Suprême.

Il convient cependant de noter l'arrêt rendu par la Cour Suprême dans la cause *Dressler v. Tallman Gravel and Supply Ltd*, 1963, 1 C.C.C. 225; 1962 S.C.R. 564: certains peuvent trouver là une certaine dissemblance avec la décision rendue dans Kipp.

De plus, la Cour d'Appel de l'Alberta dans *R. v. Mah*, 19 C.C.C. (2e éd.) page 210, a réaffirmé la valeur jurisprudentielle de l'arrêt Kipp.

D- LA DECISION DU JUGE DE PAIX:

Nous avons déjà affirmé au chapitre précédent que le recours en "mandamus" n'est pas ouvert lorsque le tribunal inférieur a exercé sa juridiction quelque erronée que puisse être sa décision; cette affirmation s'appuie sur la jurisprudence que nous avons citée.

A l'appui de la requête, le savant procureur de la requérante a insisté sur l'arrêt Kipp de la Cour Suprême que nous avons cité plus haut: après avoir affirmé que le juge de paix s'est privé de sa juridiction en se dirigeant mal sur le droit, il demande à la Cour de suivre le jugement de la Cour Suprême dans Kipp et de lui accorder ses conclusions.

En premier lieu la Cour fait une différence fondamentale entre les faits qui ont donné lieu à l'arrêt Kipp et les faits qui sont à la base de la présente requête.

Dans Kipp, la Cour Suprême avait décidé que le premier juge en maintenant une objection préliminaire avant même l'enregistrement d'un plaidoyer et ayant erré en droit dans sa décision, avait décliné sa juridiction d'entendre le procès: c'est donc le procès qu'il avait juridiction d'entendre que le premier juge avait refusé d'entendre: il n'y avait donc pas eu de décision sur le procès lui-même.

Dans la présente instance, le juge de paix a reçu la dénonciation, a tenu une enquête (pré-enquête)

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et a rendu une décision: en ce faisant, il a exercé la juridiction qui lui est conférée par les dispositions de l'article 455.3 du code criminel.

Ces constatations étant faites, la Cour pourrait dès à présent conclure au rejet de la requête.

Cependant, on veut prétendre que l'arrêt Kipp s'applique à la présente instance et on entend soumettre à la Cour que le juge de paix s'est mal dirigé en droit, et que, par conséquent, la Cour pourrait soit corriger ces erreurs de droit ou ordonner au juge de paix d'examiner de nouveau la dénonciation en fonction de nouvelles directives de droit que la présente Cour pourrait lui donner.

La Cour, sans admettre que l'arrêt Kipp s'applique à la présente cause, a quand même examiné le dossier en regard des erreurs en droit alléguées qu'aurait commises le premier juge.

Le juge de paix cerne fort bien la question qu'il avait à décider en affirmant:

"Je crois toutefois que le coeur du problème est avant tout de savoir si oui ou non l'écoute électronique (wire-tapping) avant le 30 juin 1974, était ou non légale (illégale non seulement dans le sens général de défendue comme telle par la Loi (178.11 du c. cr.) mais aussi dans le sens de générateur de crimes)."

Le juge de paix appuie sa décision sur les autorités suivantes qu'il commente d'une façon fort judicieuse:

- R. vs Chapman et Grande, 1973, 11 C.C.C. (2e ed) 84;
20 C.R.N.S. 145;
- Copeland et Adamson et al, 7 C.C.C. (2e ed) p. 393;
- R. vs Pearson, 1968, 66 W.W.R. p. 380;
- R. vs Barton Roy Lesage, S-312-74, District of York County
Court;
- R. vs Desjardins et Anueu, C.B.R. 74-9150.

Je crois approprié de faire les
remarques suivantes:

Le premier chef de la dénonciation comportait une accusation de conspiration pour commettre des vols de télécommunications: à l'audition de la requête, le savant procureur de la requérante a argumenté longuement pour tenter de convaincre la Cour que les faits révélés par la pré-enquête du juge de paix établissaient d'une part des vols de télécommunications (287(1)(b)) et d'autre part une conspiration pour commettre ces vols (423-1-d). Le procureur de la requérante a soumis que le simple fait d'intercepter des conversations téléphoniques par une personne à qui ces conversations ne sont pas destinées, constitue un vol de télécommunications au sens de l'article 287-1-b.

Nous ne pouvons partager ce point de vue: l'article 287-1-b ne peut prévoir le vol d'une propriété purement "intellectuelle"; cette disposition du code criminel suppose une évaluation en argent, pour déterminer, entre autre, la juridiction du tribunal (art. 483-a c. cr.).

C'est en vertu de nouvelles dispositions du code criminel que l'écoute électronique est défendue; si l'écoute électronique avait été défendue par l'article 287, il était inutile d'édicter de nouvelles dispositions spécifiques.

A 2879

La cause de Chapman et Grange, 20 C.R.n.s., p. 145, n'est pas d'un grand secours à la requérante: dans cette cause, les accusés avaient à répondre à une accusation de conspiration pour commettre un acte défendu par l'article 112 du "Telephone Act" de l'Ontario qui se lisait ainsi:

"Every person who, having acquired knowledge of any conversation or message passing over any telephone line not addressed to or intended for such person, divulges the purport or substance of the conversation or message, except when lawfully authorized or directed so to do, is guilty of an offence and on summary conviction is liable to a fine of not more than \$50. or to imprisonment for a term of not more than thirty days, or to both."

Dans la cause de Chapman et Grange, nous sommes loin de la conspiration pour commettre des vols de télécommunications au sens de l'article 287-1-b du code criminel.

Si les actes reprochés dans la dénonciation ne peuvent constituer des vols de télécommunications au sens de l'article 287 du code criminel, il est bien évident que l'accusation de conspiration pour commettre ces actes ne tient pas.

Les chefs 2, 3, 4 et 5 de la dénonciation comportaient des accusations de conspiration pour commettre des crimes de méfait; le crime de méfait est prévu à l'article 387 du code criminel.

Lagarde, Droit pénal canadien, 2e édition, page 954, articule ainsi les éléments essentiels du crime de méfait:

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"Pour que le prévenu puisse être déclaré coupable de "méfait" la poursuite doit prouver que l'accusé:

- a) a volontairement (386(1))
 - i) détruit ou détérioré un bien immeuble ou meuble mais corporel ou l'a rendu dangereux, inutile ou inefficace, ou
 - ii) empêché, interrompu ou gêné l'emploi, la jouissance ou l'exploitation légitime d'un bien ou une personne dans l'emploi, la jouissance ou l'exploitation légitime d'un bien.
- b) s'il avait un intérêt entier dans ce bien:
 - i) a agi dans le dessein de frauder (386(3)(b)), ou
 - ii) a causé ainsi un danger réel pour la vie des gens (387(5)) (voir aussi article 176: nuisance publique criminelle), ou a ainsi constitué un méfait à l'égard de biens publics ou privés.
- ou
- c) s'il n'avait qu'un intérêt partiel dans ce bien (386(3)(a)) ou n'y avait aucun intérêt, a ainsi causé un méfait à l'égard
 - i) d'un bien public ou
 - ii) d'un bien privé."

L'article 386(2) du code criminel prévoit un moyen de défense bien précis pour l'individu accusé de méfait:

"Nul ne doit être déclaré coupable d'une infraction visée par les articles 387 à 402 s'il prouve qu'il a agi avec une justification ou une excuse légale et avec apparence de droit."

Dans la cause actuelle, outre que l'intention coupable est manifestement inexistante, il est clair que les auteurs de ces "méfaits" se prévaudraient avec succès de la défense prévue à 386(2); l'importance des opérations "Végas" apparaît clairement à la lecture des dépositions données par Patenaude et Lavallée devant le juge Jacob Mishler; il apparaît clair et certain que les exécutants des opérations "Végas" ont agi avec une justification ou excuse légale, cette

justification ou excuse étant l'importance, dans l'intérêt public, de l'enquête qui était conduite à l'époque sur la commission sur une grande échelle de crimes sévèrement punis par le code criminel.

Patenaupe et Lavallée n'ont pas commis le méfait prévu à l'article 387 du code criminel, parce qu'il est clair qu'ils n'avaient pas "l'intention coupable"; de plus ils avaient une justification ou excuse légale.

L'accusation de conspiration pour commettre des méfaits ne peut donc tenir.

Les chefs 6, 7 et 8 de la dénonciation comportaient des accusations de conspiration pour effectuer un projet illégal défendu par l'article 25 de la loi incorporant "The Bell Telephone Company of Canada", 1880 Statutes of Canada, c. 67.

L'article 25 de la loi en question se lit ainsi:

"Any person who shall wilfully or maliciously injure, molest or destroy any of the lines, posts or other material or property of the Company, or in any way wilfully obstruct or interfere with the working of the said telephone lines, or intercept any message transmitted thereon, shall be guilty of a misdemeanor."

Le juge de paix pour motiver sa décision, cite le jugement rendu par le juge Grant de la Ontario High Court dans la cause de Copeland et Adamson & al, 7 C.C.C. (2e éd.), page 393.

Après avoir cité le même article

25, le Juge Grant ajoute:

"The only part of such section which it might be said would be breached by wire-tapping would be the words "interfere" or "intercept". Can it be said that listening in on a telephone conversation is properly described by either of such terms? The Shorter Oxford English Dictionary defines the word "interfere" as follows:

"To interpose - intersperse; to strike against each other; to come into collision; to exercise reciprocal action so as to increase, diminish or nullify the natural effects of each."

It defines the word "intercept" as follows:

"To take or seize by the way or before arrival at a destined place; to stop or interrupt the progress or course of; to interrupt communications or connections with."

I do not believe that wire-tapping which does not impede the conversation between the parties nor impede its progress can form a breach of such section because the material before me does not indicate that the audio surveillance creates any disturbance of the conversation."

On peut, dans la présente instance, affirmer comme le Juge Grant que le "material" devant le juge de paix n'indiquait pas que l'écoute par Lavallée a créé une perturbation de la conversation.

Le juge de paix a, avec raison, décidé qu'il n'y avait pas eu infraction à l'article 25 de la loi incorporant "The Bell Telephone Company of Canada". Il suit qu'il a eu raison de ne pas donner suite aux chefs de la dénonciation qui inculpaient Patenaude et Lavallée d'avoir conspiré pour enfreindre ledit article 25.

Le chef numéro 9 de la dénonciation comportait une accusation de conspiration pour effectuer un projet illégal, défendu par l'article 24 de la loi "The Quebec

Telegraph & Telephone Companies Act", 1964, R.S.Q., c. 286.

Cet article 24 se lit ainsi:

"Every person who listens to or acquires knowledge of any conversation or message passing over the lines of a telephone system, not addressed to or intended for such person, and divulges the same of the purport or substance thereof, except when lawfully authorized or directed so to do, shall be liable to the same penalty and imprisonment as are enacted in section 23 R.S. 1941, c. 298, s. 4."

Le juge de paix, face à la preuve qui était faite devant lui, en vient à conclure que Lavallée avait été légalement autorisé ou mandaté par Patenaude pour se livrer à l'écoute électronique, donc que Lavallée était dans les cadres de l'exception prévue à l'article 24; d'ailleurs, le juge de paix ajoute:

"si j'examine la preuve faite devant moi, je dois me rappeler que le motif qui a poussé Patenaude à autoriser les opérations "Végas" se dégage facilement et c'est indubitablement le même qui a poussé le législateur à adopter l'article 178.12 du code criminel."

Quant à Patenaude, son témoignage devant le juge Mishler révèle qu'il avait lui-même été autorisé par le Directeur général de la Sûreté du Québec, son supérieur immédiat, et le Ministre de la Justice.

D'ailleurs cet article 24 se rapproche presque textuellement de l'article 112 du "Telephone Act" de l'Ontario que nous avons cité plus haut et qu'il convient de citer de nouveau:

"112. Every person who, having acquired knowledge of any conversation or message passing over any telephone

"line not addressed to or intended for such person, divulges the purport or substance of the conversation or message, except when lawfully authorized or directed so to do, is guilty of an offence and on summary conviction is liable to a fine of not more than \$50 or to imprisonment for a term of not more than thirty days, or to both."

Dans la cause de Copeland et Adamson & al, citée plus haut, le Juge Grant, après avoir cité cet article 112 continue:

"It is to be noted by such section that the offence thereby created is the "(divulging) the purport or substance of the conversation or message, except when lawfully authorized or directed so to do". It follows that one who listens in or acquires knowledge of a conversation or message passing over the telephone line and refrains from relaying the same to another person would not be guilty of an offence under such section. However, one can safely assume that a police officer who has acquired information in such authorized manner which he determines is helpful in the detection or prevention of a crime will in all cases pass it on to a superior officer and divulge it if he is called as a witness at the trial of the person who made the statement if it is relevant and admissible. The divulging of the message so obtained is not by such section created an offence if the recipient is lawfully authorized or directed so to do.

The policy statement referred to makes it clear that a police officer is only permitted to use audio surveillance when approval in each case is given by the chief of police and only then when in the latter's opinion there is reasonable and probable cause to believe that a criminal offence has been or is about to be committed. In deciding whether the police officers or the commission are acting unlawfully in following such course, one should have in mind the duties and responsibilities of a board of commissioners of police as well as those of the police force itself."

Et plus loin, le Juge Grant ajoute:

"The material before me only indicates that audio surveillance is being used by the police in Metropolitan Toronto in the manner prescribed by such policy statement of the Board. This establishes that such equipment is used only with the approval in each case of the chief of police granted only when in his opinion there is reasonable and probable cause to believe that a criminal offence has been or is about to be committed. As the

"law now stands, such interception by a police officer in my opinion does not amount to an offence against s. 112 of the Telephone Act (Ontario) for the reasons set out above."

L'accusation de conspiration pour commettre une infraction à l'article 24 de la loi "The Quebec Telegraph & Telephone Companies Act." ne peut donc tenir.

Le chef numéro 10 comportait une accusation de conspiration pour effectuer un projet légal par des moyens illégaux, les moyens illégaux étant les contraventions aux articles 287-1-b et 387 du code criminel, l'article 25 de la loi incorporant "The Bell Telephone Company of Canada" et l'article 24 de la loi "The Quebec Telegraph & Telephone Companies Act".

Pour conclure que ce chef d'inculpation ne peut tenir, il suffit de dire que nous avons décidé plus haut qu'il n'y avait pas eu contravention aux diverses dispositions ci-dessus.

L'examen de la décision du juge de paix nous a donc convaincu que ce dernier n'a commis aucune des erreurs en droit que la requérante lui reprochait d'avoir commises dans l'application qu'il a faite des textes du code criminel et des deux (2) lois statutaires invoqués.

L'argumentation du procureur de la requérante ne nous a pas convaincu non plus que la Déclaration canadienne des droits de l'homme s'applique en l'espèce.

E- CONCLUSIONS:

La Cour est d'avis que le juge de paix a pleinement et d'une façon judicieuse exercé sa discrétion.

De plus, si on veut soutenir que la Cour pourrait, après avoir constaté des erreurs de droit, accorder les conclusions subsidiaires de la requête, la Cour est d'avis que le juge de paix n'a commis aucune des erreurs de droit alléguées, et sur lesquelles l'argumentation a porté.

EN CONSEQUENCE, la requête en "mandamus" est rejetée.

J.C.S.

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Nc 38-4-75

COUR SUPERIEURE
(chambre criminelle)

DISTRICT MONTREAL

DAME MARGUERITE DASTI

Partie demanderesse

vs

MONSIEUR ANDRE DURANLEAU

Partie defenderesse

JUGEMENT

rendu le: 27 Mars 1975

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C A N A D A

PROVINCE OF QUEBEC

DISTRICT OF MONTREAL

S U P E R I O R C O U R T
(Criminal Division)

March 27, 1975

Presiding Judge:

Hon. G. DESLANDES

MRS. MARGUERITE DASTI

Petitioner

- v -

MR. ANDRE DURANLEAU, Justice of the
Court for Sessions of the Peace, in
his capacity as Justice of the Peace
pursuant to Section XV of the
Criminal Code.

Respondent

J U D G M E N T

The Court has heard the parties, through their respective
counselors, on the merits of the case, has examined the proceedings
and the exhibits presented and has heard the evidence and after careful
consideration of the entire matter, finds the following:

This is a petition for "mandamus" wherein the conclusions
are the following:

"IN VIEW OF THE FOREGOING,
MAY IT PLEASE YOUR LORDSHIP AND THIS HONORABLE COURT:
GRANT this petition;

ISSUE A WRIT OF MANDAMUS CHARGING AND ORDERING the respondent Mr. ANDRE DURANLEAU, Justice of the Sessions of the Peace and Justice of the Peace pursuant to Section XV of the Criminal Code, to issue, in accordance with Article 455.3 of the Criminal Code, the summonses required by the complaints and charges of the Petitioner Marguerite DASTI, sworn to before the respondent in Montreal on December 12, 1974 against the accused, Messrs. HERVE PATENAUE and CLAUDE LAVALLEE, charging them with the violations described and stated therein:

IN ADDITION

ISSUE A WRIT OF MANDAMUS CHARGING AND ORDERING that the Laws of Canada and the Province of Quebec be applied to the said complaints and charges, to the evidence already received and to be received and to the accused, pursuant to such directives of law as this Honorable Court and Your Lordship are respectfully requested to apply to it, so that the entire matter may be determined in keeping with Law and Justice;

The conclusions in such terms as may please the Court to determine.:

A. THE FACTS:

On December 12, 1974 the petitioner appeared as complainant and presented before the respondent two identical complaints against two police officers, each one consisting of ten counts; each one of the ten counts in each one of the complaints charged one of having conspired with the other and one and the other of having conspired together with other individuals.

Count number one charged one of having conspired with the other and other individuals with the purpose of committing a criminal act, to wit, the theft of telecommunications, a criminal act described in Articles 287-1-b and 423(1)(d) of the Criminal Code.

Counts numbers two, three and four charged one of having conspired with the other and other individuals for the purpose of committing a criminal act, to wit, malfeasance, and particularly the malfeasance stipulated in Article 387(1-c and 4-a) of the Criminal Code, the victims of such malfeasance being indicated in each one of these three(3) counts: Article 423(1)(d) of the Criminal Code.

Count number five charged one of having conspired with the other and other individuals for the purpose of committing a criminal act, to wit, a malfeasance, and particularly the malfeasance stipulated in Article 387-1-a and 4-a of the Criminal Code: Article 423(1)(d).

Counts numbers six, seven and eight charged one of having conspired with the other and other individuals for the purpose of accomplishing an illegal aim, that is, commit three (3) violations stipulated in Article 25 of The Bell Telephone Company of Canada Act, 1880 Statutes of Canada ch. 67; Article 423 (2)(a) of the Criminal Code.

Count number nine charged one of having conspired with the other and other individuals for the purpose of accomplishing an illegal aim, to wit, commit the violation stipulated in Article 24 of The Quebec Telegraph and Telephone Companies Act R.S.Q., 1970, c. 286: Article 423 (2)(a) of the Criminal Code.

Count number ten charged one of having conspired with the other and other individuals for the purpose of accomplishing a legal aim by illegal means, in the sense that these means are contrary to Articles 287(1)(b), 387(4a) in relation to 387(1)(a) and (c) of the Criminal Code, to Article 25 of The Bell Telephone Company of Canada 1880 Statutes of Canada, ch. 67 and to Article 24 of The Quebec Telegraph and Telephone Companies Act, R.S.Q. 1970 c. 286.

After having the complaints sworn to on December 16, 1974, the Justice of the Peace proceeded to a preliminary hearing pursuant to the provisions of Article 455.3 of the Criminal Code.

During this preliminary hearing, Mrs. DASTI was initially heard as a witness. She introduced into evidence the record of the testimony given by Herve Patenaude and Claude Lavallee before Judge Mishler on December 14 and 29, 1974. Subsequently Mr. Richard Croteau, Chief Inspector of Bell Canada and Mr. Bernard Couture of Quebec

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Security Force, were heard.

After the conclusion of the preliminary hearing the Justice of the Peace rendered his decision on December 23, 1974, a decision which ends as follows:

NOW, THEREFORE, having examined the law, I conclude (sic) that it is not necessary to continue the preliminary hearing, accumulating additional details as to the facts of the complaints; Furthermore, I must reject the complaints of the complainant Mrs. Marguerite DASTI against Herve Patenaude and Claude Lavallee and declare that there are insufficient grounds for me to be able to pursue them any further in accordance with either one of the provisions of Article 455.3 of the Criminal Code.

B. CLAIMS OF THE PETITIONER

By her petition before the Court of the Queen's Bench, the petitioner request the issuance of a writ of mandamus against the respondent in accordance with the alternative conclusions described at the very beginning of this judgment.

By her petition for mandamus, the petitioner argues in general erroneous determinations on the law and these general arguments apply to the decision of the Justice of the Peace as a whole as stated in paragraph 9 of the petition:

- "9. It is respectfully submitted that the decision is not valid in its entirety with reference to each and every one of the counts in each one of the charges and complaints for the following erroneous determinations on the law:
- a) refusal or failure to apply to the charged violations, to the evidence presented and to the accused as well as to those designated as co-conspirators, the principle whereby an individual is presumed to desire the consequence of his own acts;
 - b) imposition during proceedings, of the burden of establishing, through independent evidence, the "mens rea" of the accused;
 - c) application to the acts, facts and actions submitted as evidence of the protective provisions of Article 25-1 of the Criminal Code, an interpretation, scope and application on which the learned respondent was mistaken;
 - d) an incorrect self instruction as to the existence in law of a defense justifying the commission of the violations charged as benefitting specially and specifically available to police officers, as well as to the

nature, the value and the legal scope of this defense;

- e) a false concept of the rights and prerogatives of the police officers differentiating them from the general public and exempting them from the general application of the law and this in the absence of any laws, statutes, regulations or council decrees or legitimate executive order decreeing, promulgating, ordering, or authorizing such an exemption or exception;
- f) an ill-founded pretension granting police officers the right or the power to authorize themselves and/or others, in the absence of laws, statutes, regulations or council decrees or legitimate executive order permitting that they be granted or granting them generally or specifically these rights power or authorization to violate the law of the province or of the country;
- g) the inadmissible application of the no less inadmissible principle that the end justifies the means;
- h) an unjustified interpretation of the law contrary to the Canadian Bill of Rights whereby citizens are deprived of their rights to equality before the law;
- i) the substitution of the Justice of the Peace for a jury in the appraisal of such a defense of justification if it exists;
- j) an illegal interpretation of the law which runs contrary to the Canadian Bill of Rights inasmuch as it does not recognize the right of a citizen not to be deprived of the legitimate exercise of a right other than by due process of law;
- k) an illogical interpretation of the law whereby the police officers would have the power to grant themselves the rights, power, privileges and authorizations that legal authority itself does not have the power to confer."

The petitioner argues particularly erroneous determinations on the law on the part of the Justice of the Peace relative to each of the counts; that is, in paragraphs 10, 11, 12, 13, 14, 15, 16, and 17 of the petition:

"10. It is respectfully submitted that as regards count number one of each of the complaints, the learned Justice of the Peace committed the erroneous determinations on the law that are listed in paragraph 9 above and further erred in law in:

- a) interpreting of article 287-1-b by considering the heading and the marginal notes rather than the text itself of the article;
- b) interpreting the said article as though it were drawn on the same terms as Article 283 and contained the same basic elements as the latter;
- c) imposing on the proceedings the burden of establishing by independent and specific evidence the "animus fuandi" of the accused.

11. It is respectfully submitted that in reference to counts numbers 2, 3, and 4, which do not differ with each other except in the names of the victims, the learned

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Justice of the Peace erred in law:

- a) in the manner described in paragraph 9 above;
- b) by interpreting as he did Article 387-1-c of the Criminal Code;

12. It is respectfully submitted that in reference to count number five the learned Justice of the Peace erred in law in:

- a) interpreting as he did article 387-1-a of the Criminal Code;
- b) applying to this offense the maxim of "De Minimis non curat Lex";
- c) committing the erroneous determinations on the law described in paragraph 9 above;

13. It is respectfully submitted that as regards count number 6, in spite of the fact that the understanding between the accused had been proven and evidence had been established that the lines, material and/or the property of Bell Canada had been voluntarily damaged and/or disturbed, in spite of the fact that Article 25 of the Act to incorporate the Bell Telephone Company of Canada is still in effect, the learned Judge did not render a decision unless his decision is implicitly included in the one he rendered relative to count number 5 and count number 8 in which case it is tainted with the same errors as the decision rendered relative to the latter counts.

14. It is respectfully submitted that with reference to count number 7, though the understanding was proven and it was established that the telephone lines had been voluntarily interfered with and/or damaged in violation of Article 25 of the said Act by the accused, the learned respondent did not render a decision, unless it was implicitly included in his decision regarding counts numbers 5 and 8, in which case the same error of law affect the said decision equally.

15. It is respectfully submitted that with reference to count number 8, the learned Justice of the Peace in addition to the errors of law described in paragraph 9 of these presents, also committed an erroneous determination on the law in his interpretation and application of the said Article 25 of the said law, by attributing to the word "interception" a meaning and a scope unjustifiably limited contrary to current language, usage, general legal interpretation and scope of the rules of interpretation of the statutes.

16. As to count number 9, it is respectfully submitted that the learned respondent erred in law in the manner described in paragraph 9 above and that he further has erred in his interpretation of the word "authorization" as it is used in the text of the cited provincial law, more particularly to Article 24 of the said law.

17. By refusing to issue the summonses requested by count number 10, the learned Judge DURANLEAU erred in law in the manner indicated in paragraph 9 of these presents, and further erred in law by interpreting Article 423-2-b of the Criminal Code in such a way that the intended lawful legitimate and even praiseworthy objects and purposes constitute a dismissal of the charges which is equivalent, for all practical purposes, to the abolition and abrogation

of this legislative provision."

The petitioner, therefore, basically founds her petition for mandamus on, according to her claims, the erroneous determinations on the law of the Justice of the Peace.

In the first place, it is the meaning of the allegations on paragraphs 18 and 19 of the petition:

"18. Your petitioner respectfully submits that except for the errors in law argued above, she would not have been deprived of her rights and privileges as a citizen, to have the accused brought to Justice.

19. Your petitioner represents with deference, that the fact already established as evidence, legally justify the issuance of the requested summonses or at the very least, continuing to receive the evidence once the questions of law have been settled in accordance with the law and that the cited errors of law essentially and materially affect the exercise of the consideration and of the appreciation of the case by the respondent and have unduly influenced his opinion and have prevented him from discerningly and legally exercising his discretion."

In the second place, during the hearing counsel for the petitioner formulated the following proposition: "By his erroneous determinations on the law, the Justice of the Peace deprived himself of his jurisdiction; by his erroneous determinations on the law, he necessarily place himself in a position wherefrom he cannot legally and judicially exercise his discretion."

C. THE MANDAMUS IN VIEW OF THE PETITIONER'S CLAIMS:

Initially it is appropriate to inquire whether the remedy of MANDAMUS is available to the petitioner, taking for granted that it has been established that in fact the Justice of the Peace made erroneous determinations on the law.

MANDAMUS is a remedy used to compel a Judge of a lower court or an officer of Justice in general to discharge his judicial duties.

The MANDAMUS recourse, therefore, exists to compel a Judge of a lower court to discharge his duty if he refused to do so; but if the duty has been discharged, the recourse of MANDAMUS is not available in spite of the fact that the decision is incorrect and no Superior Court can reverse or modify such decision or order the judge to reach a different conclusion save in truly exceptional circumstances; as for example prejudice, bias, personal interest or dishonesty.

The question which arises, as regards the MANDAMUS, is to find out if the lower court refused to exercise the discretion that he must exercise, and in such a case he can be compelled by MANDAMUS to exercise his jurisdiction or if, on the other hand, he has exercised his jurisdiction and has reached a decision or conclusion, in such a case the MANDAMUS is not the remedy, no matter how mistaken the decision or the conclusion may be.

Such principles seem well established by doctrine and jurisprudence:

1. Tremear's Criminal Code, 5th edition, pg. 1595
(6th edition, pg. 1427):

"The question which usually arises in such cases is whether the inferior tribunal has declined to exercise a discretion which it should exercise, in which case it can be compelled by mandamus to exercise its jurisdiction, or whether, on the other hand, it has exercised its jurisdiction and come to a conclusion, in which case mandamus is not the remedy, no matter how erroneous the conclusion may be."

2. Short & Mellor, "The Practice of the Crown Office"
2nd edition, page 198:

"Where any tribunal, inferior Court, or body or persons charged with the performance of a public duty do not discharge that duty, mandamus lies to compel them to do it."

page 200:

"The question is not whether the tribunal has been right or wrong in the result of the exercise of their discretion, either upon the law or upon the facts, but whether it has

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in fact exercised it."

page 206:

"Whether a magistrate has come to a right conclusion or not, either on the law or on the facts, cannot be inquired into on mandamus, but only whether he has adjudicated; but it must be an adjudication within his jurisdiction and according to law."

3. Salhany, "Canadian Criminal Procedure", 2nd edition, pages 311 and thereafter.

4. Evans v. Peace and Attorney General of Alberta, 8 C.R.n.s., page 201:

This is a decision of Judge Riley of the Supreme Court of Alberta:

"The law respecting the same has been well established over the years and can be summarized on the basis that any inferior court or board or person may be required to perform his duty if he refuses to do so, but if the duty is performed in any matter judicial in nature, certiorari and/or mandamus will not lie regardless of whether an incorrect decision is reached and no Superior Court can reverse or alter any decision or direct the inferior court to come to a different decision, save in such exceptional circumstances as prejudice, bias, personal interest, dishonesty or the like.

.....
Mandamus cannot lie with respect to the magistrate performing his duties, as all he is required to do under the Code, is hold a hearing, fairly listen to the representatives of the applicant and then within the discretion granted to him, come to a determination. The magistrate cannot be required by mandamus to hold another hearing for he has already properly held one.

Mandamus cannot lie to require the magistrate to issue a summons or warrant, for such is a matter that is wholly within his discretion. Even if the magistrate were to make erroneous determinations on the law in exercising that discretion, mandamus cannot lie.:

In this case of Evans, Judge Riley cited a great number of decisions.

In the decisions cited in Evans, it is undoubtedly appropriate to point out the following:

a) R. v. Parke, (1899), 30 O.R. 498, 3 C.C.C. 122:

"It was the duty of the police magistrate, upon receiving the information, to hear and consider the allegations of

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of the informant, and if of the opinion that cause for issuing a warrant or summons was not made out, to refuse it. And, having so acted this Court has no jurisdiction over him. It is his judgment, not mine nor that of any other Judge or Court, which is to be exercised under section 599 of the Criminal Code."

b) Broom v. Deaton, (1911) 20 O.W.R. 30, 3 O.W.N. 51, 18 C.C.C. 254 (sub. nom. Re Broom) (affirmed 20 O.W.R. 244, 30 M.N. 102, 18 C.C.C. 255):

"The magistrate's discretion in issuing or refusing to issue a summons is not subject to review in this Court."

c) Blacklock v. Primrose, (1924) 3 W.W.R. 189, 42 C.C.C. 125:

"The authorities seem quite clear that if the Magistrate has limited the ambit of his inquiry when arriving at an opinion on the alleged facts disclosed in the allegations of the complainant, this Court has no jurisdiction to interfere although it may disagree with the conclusions based on facts and law which the Magistrate arrived at."

d) Marsill v. Laclot, (1914), 20 R.L.N.S. 237, 25 C.C.C. 221, 78 D.L.R. 380:

"As a matter of principle one cannot take action by way of mandamus against a magistrate to have him render one decision rather than another; that would be to make this Court a Court of Appeals by way of mandamus from those decisions, which jurisdiction certainly does not exist in our law; moreover it would be to interfere with the discretion which is left to him by the above mentioned article (now Code s. 440). The respondent simply answered at first that, in the exercise of his discretion, he had not thought fit to issue the warrant for various reasons orally given at the hearing. I think that we could stop there and decide that there is no reason for the privileged remedy of mandamus for the varying of that judgment."

e) Thompson v. Desnoyers, (1899), 16 Que. S.C. 253, 5 R. de Jur. 405, 3 C.C.C. 58:

"I do not express any opinion upon the merits of the case. The magistrate has upon him the entire responsibility of refusing the warrant. All I say is that a mandamus cannot lie because it has not been shown that he has omitted, neglected or refused to perform his duty... and that even if I did appreciate the allegations of the complainant and the evidence differently from him this would not justify my interference."

f) Ex parte Evans, (1894) A.C. 16:

"But the Court of the Queen's Bench refused to interfere by mandamus. They said: The Justices have heard and determined it; here is the record; here is the determination."

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They may have gone wrong, but if they determined wrongly, we cannot interfere upon this application."

- g) Charleson Assessment, (1915), 21 B.C.R. 281, 8 W.W.R. 930, 22 D.L.R. 240 (sub. nom. Charleson v. Byrne):

"It is settled law that where there is cast upon any authority a duty of a public nature, that duty must be discharged, and in default recourse may be had by way of mandamus to compel its performance, yet it is to be well remembered that it is only in the case where the inferior tribunal clothed with jurisdiction to hear and determine the matter has failed to exercise the jurisdiction, that the remedy may be invoked, when granted it cannot be in the way of directing that the jurisdiction be exercised in any particular manner, that is, mandamus is only available where it is plain that there had been no exercise of the jurisdiction conferred."

- h) Fletcher v. Wade, (1919) 2 W.W.R. 1 at pg. 2, 45 D.L.R. 91:

"The Court of Revision is a judicial body and this Court cannot review its proceedings in the sense of inquiring into the correctness of the Court's conclusions. If mandamus will lie at all to a Court of Revision (which in the result I do not need to determine) it will only lie when it is made to appear that the Court has not heard and determined the complaint: when it has either expressly or virtually declined jurisdiction. If the Court of Revision in good faith entertained the respondent's appeal and adjudicated upon it, there can be no inquiry here as to correctness of its decision. We cannot sit as a Court of Appeals to review proceedings."

- i) Rex v. Neff, 3 C.R. 89, (1947) 1 W.W.R. 640, 88 C.C.C. 199:

"The question which usually arises in such cases is whether the inferior tribunal has declined to exercise a discretion which it should exercise, in which case it can be compelled by mandamus to exercise its jurisdiction, or whether, on the other hand, it has exercised its jurisdiction and come to a conclusion, in which case mandamus is not a remedy, no matter how erroneous the conclusion may be."

- j) Re Ault; Ault v. Read, (1956), 24 C.R. 260, 18 W.W.R. 438 headnote:

"Where a police magistrate in the proper exercise of his discretion has decided a matter within his jurisdiction mandamus does not lie to compel him to reconsider it, however wrong the decision may be."

5. Re Blythe and the Queen, 13 C.C.C. (2nd ed.) 192:

In this case a petition for MANDAMUS was granted; Judge Monroe of the Alberta Supreme Court explained his decision as follows:

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"He (Counsel for the Crown) also submits that this Court is without jurisdiction to grant the application because the Justice of the Peace has exercised his discretion and has made an adjudication and mandamus does not lie, there being no appeal therefrom even if this Court does not agree with his conclusions: R. v. Jones, (1970) 2 C.C.C. 374; R. v. Coughlan, Ex p. Evans, (1970) 3 C.C.C. 61, 8 C.R.N.S. 201, 70 W.W.R. 321 sub nom. Evans v. Pesce. That is so if the adjudication was made according to law, that is, if the discretion was exercised judicially following a proper hearing, but the reasons given by the Justice of the Peace herein do not indicate whether or not he believed the witnesses who testified before him and made a decision based thereon, or whether he was governed by extraneous considerations which prevented him from conducting a hearing upon the merits. In those circumstances, I think it proper to remit the matter to the Justice with a direction that he review the matter and consider all proper evidence and render his decision as to whether or not a case has been made out to indicate that there are reasonable and probable grounds for believing that the constable has committed one or both of the offences referred to in the information; and I so order."

6. Re Lapinsky, 47 C.R. :

The petition for mandamus was refused, Judge J. Brown of the British Columbia Supreme Court expressed himself as follows:

"From the above it will appear that, like counsel, I deplore the decision made by the learned magistrate. But this is mandamus and the Court does not act merely if a judicial official sought to be coerced by the writ is wrong."

In this decision, Judge Brown cites the decision in Rex v. Hauna and McLeon, 57, B.C.R.52, 1941, 3 W.W.R. 73 and particularly the following excerpt from Judge A. McDonald's notes, and on this point Judge McDonald has concurrence of his two (2) colleagues of the British Columbia Court of Appeals:

"I think it is clear that mandamus is a remedy to compel the exercise of jurisdiction by a tribunal that has refused to exercise it; and when we speak of an inferior court having exceeded its jurisdiction we simply mean that there is a lack of jurisdiction pro tanto. When a Court has entered upon a case and has given a decision, however outrageous, it seems to me impossible to say it has refused jurisdiction. To take that course is simply to sit an appeal on a tribunal and to make mandamus another form of appeal. Although, as stated above, Courts have often taken that course, I think that on the weight of

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authority it cannot be justified. In order to justify awarding a mandamus to a county court judge who has given a judgment, however absurd, the Court must say that his judgment is no judgment, but a complete nullity. There is, however, very high authority to show that a judgment cannot be treated as a nullity merely because the tribunal below has held no proper hearing and has refused to hear or consider evidence. In my opinion the County Court judge had jurisdiction to enter upon the hearing of the appeal; he did enter upon it; he was entirely wrong, I think, in the course he took, for the plain intention of the Criminal Code is that he ought to have tried the case on the merits. Nevertheless, I have concluded that Robertson J., for the reasons given in his judgment and on the authorities above mentioned, was right in holding that he was powerless to compel the judge in those proceedings to do otherwise than he had done."

The decision in Lapinsky refers to some other decision of the British Columbia Court of Appeals: That is the decision R. v. Judge of the County Court of Westminster, 57 B.C.R. 70, (1941) 3 W.W.R. 557, 76 C.C.C. 325, (1941) 4 D.L.R. 641; in this case a mandamus had been granted to compel a judge of the Court of Comte to hear an appeal relative to summary convictions, after this same judge had refused to hear this appeal because he did not have jurisdiction.

7. Rex v. County Judge of Frontenac, Re Mcleod and Amiro,
25 C.C.C. 230:

"No doubt, the High Court of Justice, exercising the powers of the traditional Court of King's Bench, may by mandamus command an inferior Court to hear a case within the jurisdiction of that Court. But where such court has decided a matter within its jurisdiction, however wrong that decision may be, mandamus does not lie to compel a reconsideration."

8. Two opinions should be pointed out; the facts which brought about these decisions resemble the situation in this matter: the opinions are the following:
R. v. Jones, 1970, C.C.C. vol 2, p. 374
Re Bokor, 4 C.C.C. (2nd) p. 177:

In the Jones opinion, the magistrate had "accepted" a complaint but had refused to issue a warrant; by "mandamus" it was requested that an order be given to him to issue a warrant; on the first point, Judge Ruttan of the British Columbia Supreme Court said:

"I pause here to note that this Court cannot in any event direct the Magistrate to issue a warrant as the informant

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has requested by his motion. This Court may only direct the Magistrate to hear the matter again and consider all proper evidence and render his decision. If on a rehearing he comes to the same conclusion after a proper hearing of the evidence, even though he may err in his conclusion in law or fact, that is no ground for a mandamus."

Judge Ruttan then continued:

"It cannot be denied that Magistrate Jones in the present case entered on a hearing of all the evidence submitted ex parte before him and he made a ruling as to his conclusions from that evidence. He noted that the young lady had been unlawfully detained and that the officer had done so illegally. He went further and held that the further ingredient of this crime, i.e. criminal intent, had not been established either by the evidence submitted or from any inference to be drawn from the evidence submitted.

Counsel for the informant submitted that once the illegal act had been shown to have been committed the intent is to be presumed and there is no burden upon the informant to establish the ingredient of criminal intent. With respect I agree with the Magistrate that he can, if he so wishes, make a finding on the absence of the ingredient of criminal intent, whether or not there be any burden on the informant to do so, and may proceed on that basis to exercise his discretion. But whether I agree or not is not material. The Magistrate may have erred in law or in fact, but I cannot control his discretion. He made a further comment on "mistake" and this may have been an improper conclusion to draw. But that comment was not necessary to the exercise of his discretion and did not govern his ruling. Even if it had done so, once again it is a conclusion the Magistrate may have drawn unlawfully from the evidence but a conclusion solely within his discretion and not to be challenged on mandamus. In reaching my conclusion I have considered in particular the decision of Brown J., in *Re Regina v. Lapinsky*, (1966) 3 C.C.C. 97, 47 C.R. 346; 54 W.W.R. 559, and the authorities there referred to."

In the Bokor opinion, the Justice of the Peace had refused to accept the complaint; Judge Galligan of the High Court of Ontario, expressed himself in the following terms:

"Mr. Bokor contends that a Justice of the Peace has no right to refuse to receive an information from a person who wishes to lay charges of offences against the criminal law. He contends further that this refusal can be corrected by a mandamus. I quite agree with his contention in law and that mandamus does lie to compel a Justice of the Peace to accept an information."

The judgment rendered by the High Court of Ontario in the

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case of R. v. Justice of the Peace, ex parte Robertson, 2 C.C.C. (2nd ed) pg. 416 approaches the Bokor opinion.

9. Likewise the Court referred to the following opinions:

- Re Regina and Carpenter, 5 C.C.C. (2nd ed.) 28
- Re Adelphi Book Store vs The Queen, 8 C.C.C. (2nd ed), 49
- Re Chambers, 13 C.R.n.s. 185
- Re R. v. Grywacheski, 3 C.C.C. (2nd ed.) 339
- Re Regina and Mann & al, 4 C.C.C. (2nd ed) 319
- R. vs Kurata, 1970, 1 C.C.C. 90
- R. vs Keller, 1971, 14 C.R.n.s. p. 234
- R. vs Metropolitan Toronto Board of Commissioners of Police 3 C.C.C. (2nd ed.) 140
- R. vs Doz, 5 C.R.n.s. p. 86.

10. Regina vs Kipp:

Kipp had been summoned for his trial after a preliminary hearing: at the trial, his counsel had made a motion for dismissal of the indictment on the grounds that it was void for duplicity.

Judge Grant of the Ontario High Court had granted a "mandamus" ordering the judge of the Court of Comte to proceed to proceed to the trial of Kipp on the original indictment: after having decided that there was no duplicity in the indictment, Judge Grant had decided that by dismissing the indictment, the Judge of the Court of Comte had refused to act on his jurisdiction: 1963, 3 C.C.C. 72:

"With respect to the said learned County Judge, I find that he was in error in so far as he held such indictment to be void for duplicity. The same is in clear and ambiguous language and therein charges the accused with only one offence, namely, that of selling as food dead animals. It is improper in determining the propriety of such charge, to import into the words of the indictment various interpretations thereof found in the definition section of the Regulations above referred to for the purpose of deciding whether it is duplicitous or not. The duplicity must appear in words of the indictment as used in their plain and ordinary meaning."

"Mandamus will lie where an inferior Court declines jurisdiction because of preliminary objection which is unfounded and which is based on mistake of law and the facts are not in dispute."

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"This is not a case where the County Judge had accepted jurisdiction and quashed the conviction on grounds of law which appeared to him sufficient so to do but before the accused pleaded or any evidence had been heard he erroneously thought the indictment was void for duplicity and by quashing the same he erroneously declined jurisdiction.

An order should therefore go setting aside the order of the learned County Court Judge by which he quashed the indictment and by way of mandamus directing him or some other Judge of the County Court Judge's Criminal Court for the County of Carleton to proceed with the trial of the accused on such indictment and to hear and determine the charge therein set forth."

The Ontario Court of Appeals affirmed the decision of Judge Grant: 1964, 3 C.C.C., pg. 13

"In our opinion the indictment was not bad for duplicity. It charged one offence and one offence only. The learned County Court Judge had the jurisdiction to try the accused with that one offence thereby charged. In effect and in law he declined to exercise the jurisdiction thus vested in him because he erroneously held that the indictment was void for duplicity. In deciding on the preliminary matter he had not entered upon the trial of the accused on the merits. His decision did not involve the merits at all. A valid indictment was a sine qua non to the Judge exercising the jurisdiction vested in him. He erroneously held that the indictment was not valid and the sine qua non therefore non-existent. Mr. Justice Grant had so carefully dealt with the matters in issue that in our opinion it is unnecessary to say anything further."

The Supreme Court of Canada had to give an opinion: 1965 2 C.C.C. pg. 133.

Honorable Justices Taschereau, Judson and Ritchie were of the opinion that the appeal should be dismissed; Honorable Justices Cartwright and Spencer would have granted the appeal.

Honorable Justice Judson speaking for the majority said:

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"The appellant relies on *Re McLeod v. Amiro* (1912) 25 C.C.C. 230, 8 D.L.R. 726, 27 O.L.R. 232, *R. v. Justices Of Middlesex* (1877), 2 Q.B.D. 516, and *R. v. Hanna and McLean*, 77 C.C.C. 32, (1941) 4 D.L.R. 584, 57 B.C.R. 52 sub. nom. *R. v. Junior Judge of the County of Nanaimo and McLean*. These are cases involving appeals from summary convictions which in the opinion of the reviewing Court were finally but erroneously decided on the merits. The cases merely hold that such decisions are not reviewable by way of mandamus. They do not touch the problem in the present case where an indictment is quashed before plea and no trial is held. All that the Crown is seeking is an order directing the County Court Judge to proceed with the trial. If he proceeds with the trial and gives a decision, that decision is open to appeal and is not reviewable on mandamus but he can be compelled to give a decision on the merits and it is no answer to such an application to say that he has exercised his jurisdiction in quashing the indictment and such a decision cannot be reviewed.

The use of the word "jurisdiction" in this context does not help one towards a solution. There is no dispute that the Judge had the power to deal with the form of the indictment and that he was acting within his jurisdiction when he quashed the indictment but he made an error in quashing this indictment. He was there to try the charge. As the matter stands now, unless the order of mandamus issues, the case as framed cannot be tried and it should be so tried. It is proper, in the circumstances, to issue the writ of mandamus. I approve of the reasons of Grant, J., on this point in their entirety (1963) 3C.C.C. 72."

Honorable Justice Cartwright dissenting, first seeks to establish that, in his opinion, the indictment was void for duplicity and that the decision of the Judge of the Court of Comte dismissing the indictment was well founded. He is furthermore of the opinion that even if the decision was incorrectly based on the law, the "mandamus" remedy was not available.

Honorable Judge Spencer shares the opinion of Judge Cartwright, while favouring the concept that the "mandamus" recourse does not apply since the judge accepted jurisdiction and acted on it sustaining a preliminary objection; he is likewise of the opinion, as is Judge Cartwright, that the indictment is void for duplicity.

"In the present case, the Court accepted jurisdiction. It was an ordinary case of a trial of an indictable offence

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where there had been a proper commitment for trial on preliminary hearing. The trial Judge, Gibson Co. Ct. J., commenced the trial and as part of the legal merits of the case found that the indictment was void for duplicity.

.....
His decision was a decision upon the legal merits. Therefore, the learned County Court Judge, having accepted jurisdiction and acted on it, mandamus to compel him to do his duty does not lie despite the fact that Grant, J., and the Court of Appeal for Ontario were of the opinion that he was in error in the performance of his duty.

.....
In the present case, I am of the opinion that the learned County Court Judge did not decline his jurisdiction but accepted it and that therefore no mandamus lies."

As to the lack of recourse in the case of a denial of

mandamus, Honorable Judge Spencer continues:

"To the objection that this will result in there being no way of reviewing the allegedly erroneous decision of the County Court Judge, it must be pointed out that such result need not be fatal. As was said by Masten, J. A., at p. 74 C.C.C., p. 479 D.L.R., p. 248 O.R., in *R. v. Hansher and Burgess*, supra, the Crown is at liberty forthwith to lay a new indictment. *Boyd, C. in Re Ratcliffe v. Crescent Mills and Timber Co. (1901)*, 1 O.L.R. 331, said at p. 333:

"That the plaintiff has no right of appeal in this case under the Division Courts Act, may be a defect of legislation, but it does not enlarge the remedy by mandamus."

And in *High on Extraordinary Legal Remedies*, 3rd ed., p.186, the learned author states:

"So when a court of appellate jurisdiction has dismissed an appeal, upon the ground that the act allowing appeals in such cases was unconstitutional and void, the writ will not go to compel the court to revise its actions and to reinstate the appeal. And this is true, even though the party aggrieved may have no other remedy to review the action of the court, since the absence of another adequate or specific remedy is not of itself ground for relief by mandamus."

The Kipp opinion, therefore, establishes the rule that applies to the situation which was then submitted to the Supreme Court.

Nevertheless it should be noted that the opinion rendered

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by the Supreme Court in the case of Dressler v. Tallman, Gravel and Supply Ltd., 1963, 1 C.C.C. 225; 1962 S.C.R. 564, some could find in it a certain discrepancy with the decision rendered in Kipp.

Furthermore, the Alberta Court of Appeals, in R. v. Mah, 19 C.C.C. (2nd ed.) pgs. 210 the juridical value of the Kipp opinion.

D. THE DECISION OF THE JUSTICE OF THE PEACE

In the foregoing chapter we have already affirmed that the remedy of "mandamus" is not available once the lower court has acted on its jurisdiction regardless of how incorrect its decision may be. This affirmation is based on the jurisprudence that we have cited.

As the basis of the petition, the learned counsel for the petitioner has insisted on the Kipp opinion in the Supreme Court which we cited beforehand. After having affirmed that the Justice of the Peace deprived himself of his jurisdiction in erroneously addressing himself to the law he asks the Court to follow the Supreme's Court opinion in Kipp and grant him his conclusions.

In the first place the Court makes a basic differentiation between the facts which brought about the Kipp opinion and the facts on which this petition is based.

In Kipp, the Supreme Court had decided that the first judge, by sustaining a preliminary objection before even taking a plea, and by having erred on the law with his decision, had waived his jurisdiction to hear the case; it is therefore a case that he had jurisdiction to hear that the first judge had refused to hear: there was therefore no decision of the case itself.

In the first instance, the Justice of the Peace received the complaint, held a hearing (preliminary hearing) and rendered a

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decision: in so doing he exercised the jurisdiction that was conferred upon him by the provisions of Article 455.3 of the Criminal Code.

These findings having been made, the Court could already conclude to reject the petition.

However, the intention is to claim that the Kipp opinion applies in this case and to argue to the Court that the Justice of the Peace erroneously determined the law and that, therefore, the Court could either correct these erroneous determinations on the law or order the Justice of the Peace to again examine the complaint relative to new directives as to the law possibly supplied to him by this Court.

The Court, without agreeing that the Kipp opinion applies in this case, nevertheless has examined the file with regard to the alleged errors of law that may have been committed by the first Judge.

The Justice of the Peace clearly focuses on the question that he had to decide upon in stating:

"I believe, however, that the core of the problem is to first learn whether wire-tapping prior to June 30, 1974 was legal or not (not only illegal in the general sense of forbidden per se by the law (178.11 of the Cr. C.) but also in the sense of contributing to further criminal acts)."

The Justice of the Peace founds his decision on the following authorities which he cites in an extremely discerning manner:

- R. vs Chapman and Grande, 1973, 11 C.C.C. (2nd ed.) 84; 20 C.R.n.s. 145;
- Copeland and Adamson et al, 7 C.C.C. (2nd ed.) p. 393;
- R. vs Pearson, 1968, 66 W.W.R. p. 380;
- R. vs Barton Roy Lesage, S-312-74, District of York County Court;
- R. vs Desjardins and Anauau, C.B.R. 74-9150.

I believe it is appropriate to make the following commentaries:

Count number one of the complaint consisted of a charge of conspiracy to commit thefts of telecommunications: during the hearing for the petition the learned counsel for the petitioner extensively argued in an attempt to persuade the Court that the facts revealed

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during the preliminary hearing held by the Justice of the Peace on the one hand, established thefts of telecommunications (287(1)(b)) and on the other, a conspiracy to commit such thefts (423-1-b). Counsel for the petitioner submitted that the simple act of the interception of telephone conversations by a person for whom these conversations are not intended, constitutes a theft of telecommunications in the sense of Article 287-1-b.

We cannot share this point of view : Article 287-1-b cannot envision the theft of purely "intellectual" property; this provision of the Criminal Code presupposes an evaluation in money for determining, among other things, the jurisdiction of the Court (Art. 483-a Cr. C.).

It is in view of these new provisions of the Criminal Code that wire-tapping is forbidden; if wire-tapping had been forbidden pursuant to Article 287, it would have been useless to enact new specific provisions.

The case of Chapman and Grange, 20 C.R.n.s., p. 145, is of no great assistance to the petitioner: In that case, the defendants had answered to a charge of conspiracy to commit an act forbidden pursuant to Article 112 of the "Telephone Act of Ontario" which said:

"Every person who, having acquired knowledge of any conversation or message passing over any telephone line not addressed to or intended for such person, divulges the purport or substance of the conversation or message, except when lawfully authorized or directed to do so, is guilty of an offence and on summary convictions is liable to a fine of not more than \$50.00 or to imprisonment for a term of not more than 30 days, or to both."

In the Chapman and Grange case, we are far from the conspiracy to commit theft of telecommunications, in the sense of Article 287-1-b of the Criminal Code.

If the acts censured in the complaint cannot constitute theft of telecommunications in the sense of the Article 287 of the

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Criminal Code, it is quite evident that the charge of conspiracy to commit such acts cannot be upheld.

Counts numbers 2, 3, 4 and 5 of the complaint carried charges of conspiracy to commit crimes of malfeasance; the crime of malfeasance is stipulated in Article 387 of the Criminal Code.

Lagarde, Canadian Penal Code 2nd edition, page 954, sets forth the essential elements of the crime of malfeasance as follows:

"In order that the accused can be declared guilty of "malfeasance", the prosecution must prove that the defendant:

- a) has voluntarily (386(1))
 - i) destroyed or caused the deterioration of real estate or tangible personal property or has made it dangerous, useless or inefficient; or
 - ii) prevented, interrupted or impeded the use, enjoyment or legitimate operation of property or a person in the use, enjoyment or legitimate operation of property.
- b) if he had full interest in this property:
 - i) has acted with the purpose of defrauding (386(3)(b)) or
 - ii) has thus caused a real danger to the lives of people (387 (5)) (see also Article 176: Criminal Public Nuisance) or has thus established malfeasance relative to private or public property; or
- c) if he had partial interest in this property (386(3)(a)) or had no interest therein, has thus caused malfeasance relative to
 - i) public property or
 - ii) private property

Article 386 (2) of the Criminal Code establishes very precise means of defense for whosoever is charged with malfeasance :

"Nobody shall be declared guilty of the offence stipulated by Article 387 through Article 402 if he can prove that he acted with some justification or a legal excuse and in the presence of law."

In the instant case, aside from the fact that the guilty intent is manifestly non-existent, it is clear that the author of these "malfeasances" would successfully avail himself of the defense set forth in 386 (2); the importance of the "VEGAS" operations is clearly evident in reading the testimony given by PATENAUDE and LAVALLEE before Judge

A 2910

Jacob Mishler; it seems clear and certain that the participants in the "VIGAS" operations acted with legal justification or excuse; this justification or excuse being the importance, in the public interest, of the investigation being conducted at the time as to high echelon perpetration of crimes that are severely punished by the Criminal Code

PATENAUDE and LAVALLEE did not commit the malfeasance set forth in Article 387 of the Criminal Code, because it is clear that they lacked the criminal intent and furthermore that they had legal justification or excuse.

The charge of conspiracy to commit malfeasance, therefore, cannot be upheld.

Counts numbers 6, 7 and 8 of the complaint stated charges of conspiracy to carry out an illegal project forbidden by article 25 of the Act to incorporate "The Bell Telephone Company of Canada", 1880 Statutes of Canada C. 67.

Article 25 of the law in question says:

"Any person who shall wilfully or maliciously injure or destroy any of the lines, posts or other materials or property of the company, or in any way wilfully obstruct or interfere with the working of the said telephone lines, or intercept any messages transmitted thereon, shall be guilty of a misdemeanor."

The Justice of the Peace, as grounds for his decision, cites the opinion of Judge Grant of the Ontario High Court in the case of Copeland and Adamson et al, 7 C.C.C. (2nd ed.) pg. 393.

After citing the same Article 25, Judge Grant adds:

"The only part of such section which it might be said would be breached by wire-tapping would be the words "interfere" or "intercept". Can it be said that listening in on a telephone conversation is properly described by either of such terms? The Shorter Oxford English Dictionary defines the word "interfere" as follows:

"To interpose = intersperse; to strike against each other; to come into collision; to exercise reciprocal action so as to increase, diminish or nullify the natural effects of each."

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It defines the word "intercept as follows:

"To take or seize by the way or before arrival at a destined place; to stop or interrupt the progress or course of; to interrupt communications or connections with."

I do not believe that wire-tapping which does not impede the conversation between the parties nor impede its progress can form a breach of such section because the material before me does not indicate that the audio surveillance creates any disturbance of the conversation."

In this instance one can determine as did Judge Grant, that the "material" before the Justice of the Peace does not indicate that the audio surveillance by LAVALLEE created any disturbance of the conversation.

The Justice of the Peace rightly decided that there had been no violation of Article 25 of "The Bell Telephone Company of Canada" incorporation act. It follows that he was right in not pursuing the various counts in the complaint charging PATENAUE and LAVALLEE with having conspired to violate the said Article 25.

Count number 9 of the complaint consisted of a charge of conspiracy to carry out an illegal project forbidden by Article 24 of "The Quebec Telephone and Telegraph Companies Act", 1964, R.S.Q., c. 286.

This Article reads as follows:

"Every person who listens to or acquires knowledge of any conversation or message passing over the lines of a telephone system not address to or intended for such person, and divulges the same or the purport or substance thereof, except when lawfully authorized or directed to do so, shall be liable to the same penalty or imprisonment as are enacted in 23 R.S. 1941, c. 298, s.4."

The Justice of the Peace faced with the evidence that was brought before him, finally concluded that LAVALLEE had, likewise, been authorized or ordered by PATENAUE to engage in the wire-tapping and therefore LAVALLEE was within the framework of the exceptions stipulated in Article 24; actually, the Justice of the Peace adds:

"If I examine the evidence presented before me I must

A 2912

remind myself that the motive which led PATENAUDE to authorize the "VEGAS" operations is easily distinguished and that it is undoubtedly the same that led the legislator to adopt Article 178.12 of the Criminal Code".

As to PATENAUDE, his testimony before Judge Mishler shows that he himself had been authorized by the Director General of the Quebec Security Force, his immediate superior, and the Minister of Justice.

Actually, this Article 24 is almost identical to Article 112 of the "Telephone Act" of Ontario which we cited beforehand and which would seem appropriate to cite again:

"112. Every person who, having acquired knowledge of any conversation or message passing over any telephone line not addressed to or intended for such person, divulges the purport or substance of the conversation or message, except when lawfully authorized or directed to do so, is guilty of an offence and on summary conviction is liable to a fine of no more than \$50.00 or to imprisonment for a term of not more than 30 days or to both."

IN the case of Cpeland and Adamson et al cited beforehand, Judge Grant after quoting Article 112 continues:

"It is to be noted by such section that the offence thereby created is the "divulging the purport or substance of the conversation or message, except when lawfully authorized or directed to do so". It follows that one who listens in or acquires knowledge of a conversation or message passing over the telephone line and refrains from relaying the same to another person would not be guilty of an offence under such section. However, one can safely assume that a police officer who has acquired information in such authorized manner which he determines is helpful in the detection or prevention of a crime will in all cases pass it on to a superior officer and divulge it if he is called as a witness at the trial of the person who made the statement if it is relevant and admissible. The divulging of the message so obtained is not by such section created an offence if the recipient is lawfully authorized or directed to do so.

The policy statement referred to makes it clear that a police officer is only permitted to use audio surveillance when approval in each case is given by the Chief of Police and only then when in the latter's opinion there is reasonable and probable cause to believe that a criminal offence has been or is about to be committed. In deciding whether the police officers or the commission are acting lawfully in following such course, one should have in mind

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the duties and responsibilities of a board of commissioners of police as well as those of the police force itself.

And further on Judge Grant adds:

"The material before me only indicates that audio surveillance is being used by the police in metropolitan Toronto in the manner prescribed by such policy statements of the Board. This establishes that such equipment is used only with the approval in each case of the Chief of Police granted only when in his opinion, there is reasonable and probable cause to believe that a criminal offence has been or is about to be committed. As the law now stands, such interception by a police officer, in my opinion, does not amount to an offence against s. 112 of the Telephone Act (Ontario) for the reasons set out above."

The charge of conspiracy to violate Article 24 of the Quebec Telephone and Telegraph Companies Act cannot therefore be upheld.

Count number 10 consisted of a charge of conspiracy to carry out an illegal project by illegal means; these illegal means being in violation of Articles 287-1-b and 387 of the Criminal Code, Article 25 of the "Bell Telephone Company of Canada" incorporation act and Article 24 of "The Quebec Telephone and Telegraph Companies Act".

To conclude that these charges cannot be upheld suffice it to say that we have decided above that there has been no violation to the above various provisions.

The examination of the decision of the Justice of the Peace has, therefore, convinced us that he has not committed any of the erroneous determinations on the law that the petitioner accused him of having committed in applying as he did the text of the Criminal Code and the two(2) quoted statutory laws.

The argument of counsel for the petitioner did not convince us either that the Canadian Bill of Rights is applicable to the case at hand.

E. CONCLUSIONS:

The Court is of the opinion that the Justice of the Peace

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has fully exercised his discretion in a discerning manner.

Furthermore, if one were willing to maintain that the Court, after having proven the erroneous determinations on the law, could grant the accessory claims in the petition, the Court is of the opinion that the Justice of the Peace did not commit any of the alleged erroneous determinations on the law that were the grounds for the arguments.

NOW THEREFORE, the petition for "mandamus" is denied.

I.C.S.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

----- EVELYN COHEN -----, being duly sworn, says that on the 10th ---
day of July, 1975 -----, I deposited in Mail Chute Drop for mailing in the
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and
State of New York, a Appellee's Appendix -----
of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper
directed to the person hereinafter named, at the place and address stated below:

Michael Klar, Esq.
1501 Franklin Ave.
Mineola, N.Y. 11501

John N. Iannuzzi, Esq.
233 Broadway
New York, N.Y. 10007

Sworn to before me this
10th day of July, 1975

Alfred P. Morgan
ALFRED P. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977

Evelyn Cohen

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

United States Attorney,
Attorney for -----

Attorney for -----

PLEASE TAKE NOTICE that the within
is a true copy of _____ duly entered
herein on the ____ day of _____
_____, in the office of the Clerk of
the U. S. District Court for the Eastern Dis-
trict of New York,
Dated: Brooklyn, New York,

United States Attorney,
Attorney for -----

Attorney for -----

UNITED STATES DISTRICT COURT
Eastern District of New York

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____
_____ is hereby admitted.

Attorney for -----

nature, the value and the legal scope of this defense;

- e) a false concept of the rights and prerogatives of the police officers differentiating them from the general public and exempting them from the general application of the law and this in the absence of any laws, statutes, regulations or council decrees or legitimate executive order decreeing, promulgating, ordering, or authorizing such an exemption or exception;
- f) an ill-founded pretension granting police officers the right or the power to authorize themselves and/or others, in the absence of laws, statutes, regulations or council decrees or legitimate executive order permitting that they be granted or granting them generally or specifically these rights power or authorization to violate the law of the province or of the country;
- g) the inadmissible application of the no less inadmissible principle that the end justifies the means;
- h) an unjustified interpretation of the law contrary to the Canadian Bill of Rights whereby citizens are deprived of their rights to equality before the law;
- i) the substitution of the Justice of the Peace for a jury in the appraisal of such a defense of justification if it exists;
- j) an illegal interpretation of the law which runs contrary to the Canadian Bill of Rights inasmuch as it does not recognize the right of a citizen not to be deprived of the legitimate exercise of a right other than by due process of law;
- k) an illogical interpretation of the law whereby the police officers would have the power to grant themselves the rights, power, privileges and authorizations that legal authority itself does not have the power to confer."

The petitioner argues particularly erroneous determinations on the law on the part of the Justice of the Peace relative to each of the counts; that is, in paragraphs 10, 11, 12, 13, 14, 15, 16, and 17 of the petition:

"10. It is respectfully submitted that as regards count number one of each of the complaints, the learned Justice of the Peace committed the erroneous determinations on the law that are listed in paragraph 9 above and further erred in law in:

- a) interpreting of article 287-1 b by considering the heading and the marginal notes rather than the text itself of the article;
- b) interpreting the said article as though it were drawn on the same terms as Article 283 and contained the same basic elements as the latter;
- c) imposing on the proceedings the burden of establishing by independent and specific evidence the "animus fuandi" of the accused.

11. It is respectfully submitted that in reference to counts numbers 2, 3, and 4, which do not differ with each other except in the names of the victims, the learned

Justice of the Peace erred in law:

- a) in the manner described in paragraph 9 above;
- b) by interpreting as he did Article 387-1-c of the Criminal Code;

12. It is respectfully submitted that in reference to count number five the learned Justice of the Peace erred in law in:

- a) interpreting as he did article 387-1-a of the Criminal Code;
- b) applying to this offense the maxim of "De Minimis non curat Lex";
- c) committing the erroneous determinations on the law described in paragraph 9 above;

13. It is respectfully submitted that as regards count number 6, in spite of the fact that the understanding between the accused had been proven and evidence had been established that the lines, material and/or the property of Bell Canada had been voluntarily damaged and/or disturbed, in spite of the fact that Article 25 of the Act to incorporate the Bell Telephone Company of Canada is still in effect, the learned Judge did not render a decision unless his decision is implicitly included in the one he rendered relative to count number 5 and count number 8 in which case it is tainted with the same errors as the decision rendered relative to the latter counts.

14. It is respectfully submitted that with reference to count number 7, though the understanding was proven and it was established that the telephone lines had been voluntarily interfered with and/or damaged in violation of Article 25 of the said Act by the accused, the learned respondent did not render a decision, unless it was implicitly included in his decision regarding counts numbers 5 and 8, in which case the same error of law affect the said decision equally.

15. It is respectfully submitted that with reference to count number 8, the learned Justice of the Peace in addition to the errors of law described in paragraph 9 of these presents, also committed an erroneous determination on the law in his interpretation and application of the said Article 25 of the said law, by attributing to the word "interception" a meaning and a scope unjustifiably limited contrary to current language, usage, general legal interpretation and scope of the rules of interpretation of the statutes.

16. As to count number 9, it is respectfully submitted that the learned respondent erred in law in the manner described in paragraph 9 above and that he further has erred in his interpretation of the word "authorization" as it is used in the text of the cited provincial law, more particularly to Article 24 of the said law.

17. By refusing to issue the summonses requested by count number 10, the learned Judge DURANLEAU erred in law in the manner indicated in paragraph 9 of these presents, and further erred in law by interpreting Article 423-2-b of the Criminal Code in such a way that the intended lawful legitimate and even praiseworthy objects and purposes constitute a dismissal of the charge which is equivalent, for all practical purposes, to the abolition and abrogation

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of this legislative provision."

The petitioner, therefore, basically founds her petition for mandamus on, according to her claims, the erroneous determinations on the law of the Justice of the Peace.

In the first place, it is the meaning of the allegations on paragraphs 18 and 19 of the petition:

"18. Your petitioner respectfully submits that except for the errors in law argued above, she would not have been deprived of her rights and privileges as a citizen, to have the accused brought to Justice.

19. Your petitioner represents with deference, that the fact already established as evidence, legally justify the issuance of the requested summonses or at the very least, continuing to receive the evidence once the questions of law have been settled in accordance with the law and that the cited errors of law essentially and materially affect the exercise of the consideration and of the appreciation of the case by the respondent and have unduly influenced his opinion and have prevented him from discerningly and legally exercising his discretion."

In the second place, during the hearing counsel for the petitioner formulated the following proposition: "By his erroneous determinations on the law, the Justice of the Peace deprived himself of his jurisdiction; by his erroneous determinations on the law, he necessarily place himself in a position wherefrom he cannot legally and judicially exercise his discretion."

C. THE MANDAMUS IN VIEW OF THE PETITIONER'S CLAIMS:

Initially it is appropriate to inquire whether the remedy of MANDAMUS is available to the petitioner, taking for granted that it has been established that in fact the Justice of the Peace made erroneous determinations on the law.

MANDAMUS is a remedy used to compel a Judge of a lower court or an officer of Justice in general to discharge his judicial duties.

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The MANDAMUS recourse, therefore, exists to compel a Judge of a lower court to discharge his duty if he refused to do so; but if the duty has been discharged, the recourse of MANDAMUS is not available in spite of the fact that the decision is incorrect and no Superior Court can reverse or modify such decision or order the judge to reach a different conclusion save in truly exceptional circumstances; as for example prejudice, bias, personal interest or dishonesty.

The question which arises, as regards the MANDAMUS, is to find out if the lower court refused to exercise the discretion that he must exercise, and in such a case he can be compelled by MANDAMUS to exercise his jurisdiction or if, on the other hand, he has exercised his jurisdiction and has reached a decision or conclusion, in such a case the MANDAMUS is not the remedy, no matter how mistaken the decision or the conclusion may be.

Such principles seem well established by doctrine and jurisprudence:

1. Tremear's Criminal Code, 5th edition, pg. 1595
(6th edition, pg. 1427):

"The question which usually arises in such cases is whether the inferior tribunal has declined to exercise a discretion which it should exercise, in which case it can be compelled by mandamus to exercise its jurisdiction, or whether, on the other hand, it has exercised its jurisdiction and come to a conclusion, in which case mandamus is not the remedy, no matter how erroneous the conclusion may be."

2. Short & Mellor, "The Practice of the Crown Office"
2nd edition, page 198:

"Where any tribunal, inferior Court, or body or persons charged with the performance of a public duty do not discharge that duty, mandamus lies to compel them to do it."

page 200:

"The question is not whether the tribunal has been right or wrong in the result of the exercise or their discretion, either upon the law or upon the facts, but whether it has

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in fact exercised it."

page 206:

"Whether a magistrate has come to a right conclusion or not, either on the law or on the facts, cannot be inquired into on mandamus, but only whether he has adjudicated; but it must be an adjudication within his jurisdiction and according to law."

3. Salhany, "Canadian Criminal Procedure", 2nd edition, pages 311 and thereafter.

4. Evans v. Pesce and Attorney General of Alberta, 8 C.R.n.s., page 201:

This is a decision of Judge Riley of the Supreme Court of Alberta:

"The law respecting the same has been well established over the years and can be summarized on the basis that any inferior court or board or person may be required to perform his duty if he refuses to do so, but if the duty is performed in any matter judicial in nature, certiorari and/or mandamus will not lie regardless of whether an incorrect decision is reached and no Superior Court can reverse or alter any decision or direct the inferior court to come to a different decision, save in such exceptional circumstances as prejudice, bias, personal interest, dishonesty or the like.

.....
Mandamus cannot lie with respect to the magistrate performing his duties, as all he is required to do under the Code, is hold a hearing, fairly listen to the representatives of the applicant and then within the discretion granted to him, come to a determination. The magistrate cannot be required by mandamus to hold another hearing for he has already properly held one.

Mandamus cannot lie to require the magistrate to issue a summons or warrant, for such is a matter that is wholly within his discretion. Even if the magistrate were to make erroneous determinations on the law in exercising that discretion, mandamus cannot lie.:

In this case of Evans, Judge Riley cited a great number of decisions.

In the decisions cited in Evans, it is undoubtedly appropriate to point out the following:

a) R. v. Parke, (1899), 30 O.R. 498, 3 C.C.C. 122:

"It was the duty of the police magistrate, upon receiving the information, to hear and consider the allegations of

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of the informant, and if of the opinion that cause for issuing a warrant or summons was not made out, to refuse it. And, having so acted this Court has no jurisdiction over him. It is his judgment, not mine nor that of any other Judge or Court, which is to be exercised under section 299 of the Criminal Code."

b) Brown v. Denison, (1911) 20 O.W.R. 30, 3 O.W.N. 51, 18 C.C.C. 254 (sub. nom. Re Broom) (affirmed 20 O.W.R. 244, 30 W.N. 102, 18 C.C.C. 255):

"The magistrate's discretion in issuing or refusing to issue a summons is not subject to review in this Court."

c) Blacklock v. Primrose, (1924) 3 W.W.R. 189, 42 C.C.C. 125:

"The authorities seem quite clear that if the Magistrate has limited the ambit of his inquiry when arriving at an opinion on the alleged facts disclosed in the allegations of the complainant, this Court has no jurisdiction to interfere although it may disagree with the conclusions based on facts and law which the Magistrate arrived at."

d) Marshall v. Lauchler, (1914), 20 R.L.N.S. 237, 25 C.C.C. 221, 28 D.L.R. 380:

"As a matter of principle one cannot take action by way of mandamus against a magistrate to have him render one decision rather than another; that would be to make this Court a Court of Appeals by way of mandamus from those decisions, which jurisdiction certainly does not exist in our law; moreover it would be to interfere with the discretion which is left to him by the above mentioned article (now Code s. 440). The respondent simply answered at first that, in the exercise of his discretion, he had not thought fit to issue the warrant for various reasons orally given at the hearing. I think that we could stop there and decide that there is no reason for the privileged remedy of mandamus for the varying of that judgment."

e) Thompson v. Desnoyers, (1899), 16 Que. S.C. 253, 5 E. de Jur. 405, 3 C.C.C. 58:

"I do not express any opinion upon the merits of the case. The magistrate has upon him the entire responsibility of refusing the warrant. All I say is that a mandamus cannot lie because it has not been shown that he has omitted, neglected or refused to perform his duty... and that even if I did appreciate the allegations of the complainant and the evidence differently from him this would not justify my interference."

f) Ex parte Evans, (1894) A.C. 16:

"But the Court of the Queen's Bench refused to interfere by mandamus. They said: The Justices have heard and determined it; here is the record; here is the determination."

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They may have gone wrong, but if they determined wrongly, we cannot interfere upon this application."

- g) Charleson Assessment, (1915), 21 B.C.R. 281, 8 W.W.R. 930, 22 D.L.R. 240 (sub. nom. Charleson v. Byrne):

"It is settled law that where there is cast upon any authority a duty of a public nature, that duty must be discharged, and in default recourse may be had by way of mandamus to compel its performance, yet it is to be well remembered that it is only in the case where the inferior tribunal clothed with jurisdiction to hear and determine the matter has failed to exercise the jurisdiction, that the remedy may be invoked, when granted it cannot be in the way of directing that the jurisdiction be exercised in any particular manner, that is, mandamus is only available where it is plain that there had been no exercise of the jurisdiction conferred."

- h) Fletcher v. Wade, (1919) 2 W.W.R. 1 at pg. 2, 45 D.L.R. 91:

"The Court of Revision is a judicial body and this Court cannot review its proceedings in the sense of inquiring into the correctness of the Court's conclusions. If mandamus will lie at all to a Court of Revision (which in the result I do not need to determine) it will only lie when it is made to appear that the Court has not heard and determined the complaint: when it has either expressly or virtually declined jurisdiction. If the Court of Revision in good faith entertained the respondent's appeal and adjudicated upon it, there can be no inquiry here as to correctness of its decision. We cannot sit as a Court of Appeals to review proceedings."

- i) Rex v. Neff, 3 C.R. 89, (1947) 1 W.W.R. 640, 88 C.C.C. 199:

"The question which usually arises in such cases is whether the inferior tribunal has declined to exercise a discretion which it should exercise, in which case it can be compelled by mandamus to exercise its jurisdiction, or whether, on the other hand, it has exercised its jurisdiction and come to a conclusion, in which case mandamus is not a remedy, no matter how erroneous the conclusion may be."

- j) Re Ault; Ault v. Read, (1956), 24 C.R. 260, 18 W.W.R. 438 headnote:

"Where a police magistrate in the proper exercise of his discretion has decided a matter within his jurisdiction mandamus does not lie to compel him to reconsider it, however wrong the decision may be."

5. Re Blythe and the Queen, 13 C.C.C. (2nd ed.) 192:

In this case a petition for MANDAMUS was granted; Judge

Monroe of the Alberta Supreme Court explained his decision as follows:

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"He (Counsel for the Crown) also submits that this Court is without jurisdiction to grant the application because the Justice of the Peace has exercised his discretion and has made an adjudication and mandamus does not lie, there being no appeal therefrom even if this Court does not agree with his conclusions: R. v. Jones, (1970) 2 C.C.C. 374; R. v. Coughlan, Ex p. Evans, (1970) 3 C.C.C. 61, 8 C.R.N.S. 201, 70 W.W.R. 321 sub nom. Evans v. Pesce. That is so if the adjudication was made according to law, that is, if the discretion was exercised judicially following a proper hearing, but the reasons given by the Justice of the Peace herein do not indicate whether or not he believed the witnesses who testified before him and made a decision based thereon, or whether he was governed by extraneous considerations which prevented him from conducting a hearing upon the merits. In those circumstances, I think it proper to remit the matter to the Justice with a direction that he review the matter and consider all proper evidence and render his decision as to whether or not a case has been made out to indicate that there are reasonable and probable grounds for believing that the constable has committed one or both of the offences referred to in the information; and I so order."

6. Re Lapinsky, 47 C.R. :

The petition for mandamus was refused, Judge J. Brown of

the British Columbia Supreme Court expressed himself as follows:

"From the above it will appear that, like counsel, I deplore the decision made by the learned magistrate. But this is mandamus and the Court does not act merely if a judicial official sought to be coerced by the writ is wrong."

In this decision, Judge Brown cites the decision in Rex

v. Hauna and McLeon, 57, B.C.R. 52, 1941, 3 W.W.R. 73 and particularly

the following excerpt from Judge A. McDonald's notes, and on this point

Judge McDonald has concurrence of his two (2) colleagues of the British

Columbia Court of Appeals:

"I think it is clear that mandamus is a remedy to compel the exercise of jurisdiction by a tribunal that has refused to exercise it; and when we speak of an inferior court having exceeded its jurisdiction we simply mean that there is a lack of jurisdiction pro tanto. When a Court has entered upon a case and has given a decision, however outrageous, it seems to me impossible to say it has refused jurisdiction. To take that course is simply to sit an appeal on a tribunal and to make mandamus another form of appeal. Although, as stated above, Courts have often taken that course, I think that on the weight of

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authority it cannot be justified. In order to justify awarding a mandamus to a county court judge who has given a judgment, however absurd, the Court must say that his judgment is no judgment, but a complete nullity. There is, however, very high authority to show that a judgment cannot be treated as a nullity merely because the tribunal below has held no proper hearing and has refused to hear or consider evidence. In my opinion the County Court judge had jurisdiction to enter upon the hearing of the appeal; he did enter upon it; he was entirely wrong, I think, in the course he took, for the plain intention of the Criminal Code is that he ought to have tried the case on the merits. Nevertheless, I have concluded that Robertson J., for the reasons given in his judgment and on the authorities above mentioned, was right in holding that he was powerless to compel the judge in those proceedings to do otherwise than he had done."

The decision in Lapinsky refers to some other decision of the British Columbia Court of Appeals: That is the decision R. v. Judge of the County Court of Westminster, 57 B.C.R. 70, (1941) 3 W.W.R. 557, 76 C.C.C. 325, (1941) 4 D.L.R. 641; in this case a mandamus had been granted to compel a judge of the Court of Comte to hear an appeal relative to summary convictions, after this same judge had refused to hear this appeal because he did not have jurisdiction.

7. Rex v. County Judge of Frontenac, Re Mcleod and Amiro, 25 C.C.C. 230:

"No doubt, the High Court of Justice, exercising the powers of the traditional Court of King's Bench, may by mandamus command an inferior Court to hear a case within the jurisdiction of that Court. But where such court has decided a matter within its jurisdiction, however wrong that decision may be, mandamus does not lie to compel a reconsideration."

8. Two opinions should be pointed out; the facts which brought about these decisions resemble the situation in this matter: the opinions are the following:
R. v. Jones, 1970, C.C.C. vol 2, p. 374
Re Bokor, 4 C.C.C. (2nd) p. 177:

In the Jones opinion, the magistrate had "accepted" a complaint but had refused to issue a warrant; by "mandamus" it was requested that an order be given to him to issue a warrant; on the first point, Judge Ruttan of the British Columbia Supreme Court said:

"I pause here to note that this Court cannot in any event direct the Magistrate to issue a warrant as the informant

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has requested by his motion. This Court may only direct the Magistrate to hear the matter again and consider all proper evidence and render his decision. If on a rehearing he comes to the same conclusion after a proper hearing of the evidence, even though he may err in his conclusion in law or fact, that is no ground for a mandamus."

Judge Ruttan then continued:

"It cannot be denied that Magistrate Jones in the present case entered on a hearing of all the evidence submitted ex parte before him and he made a ruling as to his conclusions from that evidence. He noted that the young lady had been unlawfully detained and that the officer had done so illegally. He went further and held that the further ingredient of this crime, i.e. criminal intent, had not been established either by the evidence submitted or from any inference to be drawn from the evidence submitted.

Counsel for the informant submitted that once the illegal act had been shown to have been committed the intent is to be presumed and there is no burden upon the informant to establish the ingredient of criminal intent. With respect I agree with the Magistrate that he can, if he so wishes, make a finding on the absence of the ingredient of criminal intent, whether or not there be any burden on the informant to do so, and may proceed on that basis to exercise his discretion. But whether I agree or not is not material. The Magistrate may have erred in law or in fact, but I cannot control his discretion. He made a further comment on "mistake" and this may have been an improper conclusion to draw. But that comment was not necessary to the exercise of his discretion and did not govern his ruling. Even if it had done so, once again it is a conclusion the Magistrate may have drawn unlawfully from the evidence but a conclusion solely within his discretion and not to be challenged on mandamus. In reaching my conclusion I have considered in particular the decision of Brown J., in Re Regina v. Lapinsky, (1966) 3 C.C.C. 97, 47 C.R. 346; 54 W.W.R. 559, and the authorities there referred to."

In the Bokor opinion, the Justice of the Peace had refused to accept the complaint; Judge Galligan of the High Court of Ontario, expressed himself in the following terms:

"Mr. Bokor contends that a Justice of the Peace has no right to refuse to receive an information from a person who wishes to lay charges of offences against the criminal law. He contends further that this refusal can be corrected by a mandamus. I quite agree with his contention in law and that mandamus does lie to compel a Justice of the Peace to accept an information."

The judgment rendered by the High Court of Ontario in the

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case of R. v. Justice of the Peace, ex parte Robertson, 2 C.C.C. (2nd ed) pg. 416 approaches the Bokor opinion.

9. Likewise the Court referred to the following opinions:

- Re Regina and Carpenter, 5 C.C.C. (2nd ed.) 28
- Re Adelphi Book Store vs The Queen, 8 C.C.C. (2nd ed), 49
- Re Chambers, 13 C.R.n.s. 185
- Re R. v. Grywacheski, 3 C.C.C. (2nd ed.) 339
- Re Regina and Mann & al, 4 C.C.C. (2nd ed) 319
- R. vs Kurata, 1970, 1 C.C.C. 90
- R. vs Keller, 1971, 14 C.R.n.s. p. 234
- R. vs Metropolitan Toronto Board of Commissioners of Police 3 C.C.C. (2nd ed.) 140
- R. vs Doz, 5 C.R.n.s. p. 86.

10. Regina vs Kipp:

Kipp had been summoned for his trial after a preliminary hearing: at the trial, his counsel had made a motion for dismissal of the indictment on the grounds that it was void for duplicity.

Judge Grant of the Ontario High Court had granted a "mandamus" ordering the judge of the Court of Comte to proceed to proceed to the trial of Kipp on the original indictment: after having decided that there was no duplicity in the indictment, Judge Grant had decided that by dismissing the indictment, the Judge of the Court of Comte had refused to act on his jurisdiction: 1963, 3 C.C.C. 72:

"With respect to the said learned County Judge, I find that he was in error in so far as he held such indictment to be void for duplicity. The same is in clear and ambiguous language and therein charges the accused with only one offence, namely, that of selling as food dead animals. It is improper in determining the propriety of such charge, to import into the words of the indictment various interpretations thereof found in the definition section of the Regulations above referred to for the purpose of deciding whether it is duplicitous or not. The duplicity must appear in words of the indictment as used in their plain and ordinary meaning."

"Mandamus will lie where an inferior Court declines declines jurisdiction because of preliminary objection which is unfounded and which is based on mistake of law and the facts are not in dispute."

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"This is not a case where the County Judge had accepted jurisdiction and quashed the conviction on grounds of law which appeared to him sufficient so to do but before the accused pleaded or any evidence had been heard he erroneously thought the indictment was void for duplicity and by quashing the same he erroneously declined jurisdiction.

An order should therefore go setting aside the order of the learned County Court Judge by which he quashed the indictment and by way of mandamus directing him or some other Judge of the County Court Judge's Criminal Court for the County of Carleton to proceed with the trial of the accused on such indictment and to hear and determine the charge therein set forth."

The Ontario Court of Appeals affirmed the decision of Judge

Grant: 1964, 3 C.C.C., pg. 13

"In our opinion the indictment was not bad for duplicity. It charged one offence and one offence only. The learned County Court Judge had the jurisdiction to try the accused with that one offence thereby charged. In effect and in law he declined to exercise the jurisdiction thus vested in him because he erroneously held that the indictment was void for duplicity. In deciding on the preliminary matter he had not entered upon the trial of the accused on the merits. His decision did not involve the merits at all. A valid indictment was a sine qua non to the Judge exercising the jurisdiction vested in him. He erroneously held that the indictment was not valid and the sine qua non therefore non-existent. Mr. Justice Grant had so carefully dealt with the matters in issue that in our opinion it is unnecessary to say anything further."

The Supreme Court of Canada had to give an opinion: 1965

2 C.C.C. pg. 133.

Honorable Justices Taschereau, Judson and Ritchie were of the opinion that the appeal should be dismissed; Honorable Justices Cartwright and Spencer would have granted the appeal.

Honorable Justice Judson speaking for the majority said:

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"The appellant relies on *Re McLeod v. Amiro* (1912) 25 C.C.C. 230, 8 D.L.R. 726, 27 O.L.R. 232, *R. v. Justices Of Middlesex* (1877), 2 Q.B.D. 516, and *R. v. Hanna and McLean*, 77 C.C.C. 32, (1941) 4 D.L.R. 584, 57 B.C.R. 52 sub. nom. *R. v. Junior Judge of the County of Nanaimo and McLean*. These are cases involving appeals from summary convictions which in the opinion of the reviewing Court were finally but erroneously decided on the merits. The cases merely hold that such decisions are not reviewable by way of mandamus. They do not touch the problem in the present case where an indictment is quashed before plea and no trial is held. All that the Crown is seeking is an order directing the County Court Judge to proceed with the trial. If he proceeds with the trial and gives a decision, that decision is open to appeal and is not reviewable on mandamus but he can be compelled to give a decision on the merits and it is no answer to such an application to say that he has exercised his jurisdiction in quashing the indictment and such a decision cannot be reviewed.

The use of the word "jurisdiction" in this context does not help one towards a solution. There is no dispute that the Judge had the power to deal with the form of the indictment and that he was acting within his jurisdiction when he quashed the indictment but he made an error in quashing this indictment. He was there to try the charge. As the matter stands now, unless the order of mandamus issues, the case as framed cannot be tried and it should be so tried. It is proper, in the circumstances, to issue the writ of mandamus. I approve of the reasons of Grant, J., on this point in their entirety (1963) 3C.C.C. 72."

Honorable Justice Cartwright dissenting, first seeks to establish that, in his opinion, the indictment was void for duplicity and that the decision of the Judge of the Court of Comte dismissing the indictment was well founded. He is furthermore of the opinion that even if the decision was incorrectly based on the law, the "mandamus" remedy was not available.

Honorable Judge Spencer shares the opinion of Judge Cartwright, while favouring the concept that the "mandamus" recourse does not apply since the judge accepted jurisdiction and acted on it sustaining a preliminary objection; he is likewise of the opinion, as is Judge Cartwright, that the indictment is void for duplicity.

"In the present case, the Court accepted jurisdiction. It was an ordinary case of a trial of an indictable offence

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where there had been a proper commitment for trial on preliminary hearing. The trial Judge, Gibson Co. Ct. J., commenced the trial and as part of the legal merits of the case found that the indictment was void for duplicity.

His decision was a decision upon the legal merits. Therefore, the learned County Court Judge, having accepted jurisdiction and acted on it, mandamus to compel him to do his duty does not lie despite the fact that Grant, J., and the Court of Appeal for Ontario were of the opinion that he was in error in the performance of his duty.

In the present case, I am of the opinion that the learned County Court Judge did not decline his jurisdiction but accepted it and that therefore no mandamus lies."

As to the lack of recourse in the case of a denial of

mandamus, Honorable Judge Spencer continues:

"To the objection that this will result in there being no way of reviewing the allegedly erroneous decision of the County Court Judge, it must be pointed out that such result need not be fatal. As was said by Masten, J. A., at p. 74 C.C.C., p. 479 D.L.R., p. 248 O.R., in *R. v. Hansher and Burgess*, supra, the Crown is at liberty forthwith to lay a new indictment. *Boyd, C. in Re Ratcliffe v. Crescent Mills and Timber Co.* (1901), 1 O.L.R. 331, said at p. 333: "That the plaintiff has no right of appeal in this case under the Division Courts Act, may be a defect of legislation, but it does not enlarge the remedy by mandamus."

And in *High on Extraordinary Legal Remedies*, 3rd ed., p.186, the learned author states:

"So when a court of appellate jurisdiction has dismissed an appeal, upon the ground that the act allowing appeals in such cases was unconstitutional and void, the writ will not go to compel the court to revise its actions and to reinstate the appeal. And this is true, even though the party aggrieved may have no other remedy to review the action of the court, since the absence of another adequate or specific remedy is not of itself ground for relief by mandamus."

The Kipp opinion, therefore, establishes the rule that applies to the situation which was then submitted to the Supreme Court.

Nevertheless it should be noted that the opinion rendered

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by the Supreme Court in the case of Dressler v. Tallman, Gravel and Supply Ltd., 1963, 1 C.C.C. 225; 1962 S.C.R. 564, some could find in it a certain discrepancy with the decision rendered in Kipp.

Furthermore, the Alberta Court of Appeals, in R. v. Mah, 19 C.C.C. (2nd ed.) pgs. 210 the juridical value of the Kipp opinion.

D. THE DECISION OF THE JUSTICE OF THE PEACE

In the foregoing chapter we have already affirmed that the remedy of "mandamus" is not available once the lower court has acted on its jurisdiction regardless of how incorrect its decision may be. This affirmation is based on the jurisprudence that we have cited.

As the basis of the petition, the learned counsel for the petitioner has insisted on the Kipp opinion in the Supreme Court which we cited beforehand. After having affirmed that the Justice of the Peace deprived himself of his jurisdiction in erroneously addressing himself to the law he asks the Court to follow the Supreme's Court opinion in Kipp and grant him his conclusions.

In the first place the Court makes a basic differentiation between the facts which brought about the Kipp opinion and the facts on which this petition is based.

In Kipp, the Supreme Court had decided that the first judge, by sustaining a preliminary objection before even taking a plea, and by having erred on the law with his decision, had waived his jurisdiction to hear the case; it is therefore a case that he had jurisdiction to hear that the first judge had refused to hear: there was therefore no decision of the case itself.

In the first instance, the Justice of the Peace received the complaint, held a hearing (preliminary hearing) and rendered a

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decision: in so doing he exercised the jurisdiction that was conferred upon him by the provisions of Article 455.3 of the Criminal Code.

These findings having been made, the Court could already conclude to reject the petition.

However, the intention is to claim that the Kipp opinion applies in this case and to argue to the Court that the Justice of the Peace erroneously determined the law and that, therefore, the Court could either correct these erroneous determinations on the law or order the Justice of the Peace to again examine the complaint relative to new directives as to the law possibly supplied to him by this Court.

The Court, without agreeing that the Kipp opinion applies in this case, nevertheless has examined the file with regard to the alleged errors of law that may have been committed by the first Judge.

The Justice of the Peace clearly focuses on the question that he had to decide upon in stating:

"I believe, however, that the core of the problem is to first learn whether wire-tapping prior to June 30, 1974 was legal or not (not only illegal in the general sense of forbidden per se by the law (178.11 of the Cr. C.) but also in the sense of contributing to further criminal acts)."

The Justice of the Peace founds his decision on the following authorities which he cites in an extremely discerning manner:

- R. vs Chapman and Grande, 1973, 11 C.C.C. (2nd ed.) 84; 20 C.R.n.s. 145;
- Copeland and Adamson et al, 7 C.C.C. (2nd ed.) p. 393;
- R. vs Pearson, 1968, 66 W.W.R. p. 380;
- R. vs Barton Roy Lesage, S-312-74, District of York County Court;
- R. vs Desjardins and Anau, C.B.R. 74-9150.

I believe it is appropriate to make the following commentaries:

Count number one of the complaint consisted of a charge of conspiracy to commit thefts of telecommunications: during the hearing for the petition the learned counsel for the petitioner extensively argued in an attempt to persuade the Court that the facts revealed

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during the preliminary hearing held by the Justice of the Peace on the one hand, established thefts of telecommunications (287(1)(b)) and on the other, a conspiracy to commit such thefts (423-1-b). Counsel for the petitioner submitted that the simple act of the interception of telephone conversations by a person for whom these conversations are not intended, constitutes a theft of telecommunications in the sense of Article 287-1-b.

We cannot share this point of view : Article 287-1-b cannot envision the theft of purely "intellectual" property; this provision of the Criminal Code presupposes an evaluation in money for determining, among other things, the jurisdiction of the Court (Art. 483-a Cr. C.).

It is in view of these new provisions of the Criminal Code that wire-tapping is forbidden; if wire-tapping had been forbidden pursuant to Article 287, it would have been useless to enact new specific provisions.

The case of Chapman and Grange, 20 C.R.n.s., p. 145, is of no great assistance to the petitioner: In that case, the defendants had answered to a charge of conspiracy to commit an act forbidden pursuant to Article 112 of the "Telephone Act of Ontario" which said:

"Every person who, having acquired knowledge of any conversation or message passing over any telephone line not addressed to or intended for such person, divulges the purport or substance of the conversation or message, except when lawfully authorized or directed to do so, is guilty of an offence and on summary convictions is liable to a fine of not more than \$50.00 or to imprisonment for a term of not more than 30 days, or to both."

In the Chapman and Grange case, we are far from the conspiracy to commit theft of telecommunications, in the sense of Article 287-1-b of the Criminal Code.

If the acts censured in the complaint cannot constitute theft of telecommunications in the sense of the Article 287 of the

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Criminal Code, it is quite evident that the charge of conspiracy to commit such acts cannot be upheld.

Counts numbers 2, 3, 4 and 5 of the complaint carried charges of conspiracy to commit crimes of malfeasance; the crime of malfeasance is stipulated in Article 387 of the Criminal Code.

Lagarde, Canadian Penal Code 2nd edition, page 954, sets forth the essential elements of the crime of malfeasance as follows:

"In order that the accused can be declared guilty of "malfeasance", the prosecution must prove that the defendant:

- a) has voluntarily (386(1))
 - i) destroyed or caused the deterioration of real estate or tangible personal property or has made it dangerous, useless or inefficient; or
 - ii) prevented, interrupted or impeded the use, enjoyment or legitimate operation of property or a person in the use, enjoyment or legitimate operation of property.
- b) if he had full interest in this property:
 - i) has acted with the purpose of defrauding (386(3)(b)) or
 - ii) has thus caused a real danger to the lives of people (387 (5)) (see also Article 176: Criminal Public Nuisance) or has thus established malfeasance relative to private or public property; or
- c) if he had partial interest in this property (386(3)(a)) or had no interest therein, has thus caused malfeasance relative to
 - i) public property or
 - ii) private property

Article 386 (2) of the Criminal Code establishes very precise means of defense for whosoever is charged with malfeasance :

"Nobody shall be declared guilty of the offence stipulated by Article 387 through Article 402 if he can prove that he acted with some justification or a legal excuse and in the presence of law."

In the instant case, aside from the fact that the guilty intent is manifestly non-existent, it is clear that the author of these "malfeasances" would successfully avail himself of the defense set forth in 386 (2); the importance of the "VEGAS" operations is clearly evident in reading the testimony given by PATENAUDE and LAVALLEE before Judge

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Jacob Mishler; it seems clear and certain that the participants in the "VECAS" operations acted with legal justification or excuse; this justification or excuse being the importance, in the public interest, of the investigation being conducted at the time as to high echelon perpetration of crimes that are severely punished by the Criminal Code

PATENAUDE and LAVALLEE did not commit the malfeasance set forth in Article 387 of the Criminal Code, because it is clear that they lacked the criminal intent and furthermore that they had legal justification or excuse.

The charge of conspiracy to commit malfeasance, therefore, cannot be upheld.

Counts numbers 6, 7 and 8 of the complaint stated charges of conspiracy to carry out an illegal project forbidden by article 25 of the Act to incorporate "The Bell Telephone Company of Canada", 1880 Statutes of Canada C. 67.

Article 25 of the law in question says:

"Any person who shall wilfully or maliciously injure or destroy any of the lines, posts or other materials or property of the company, or in any way wilfully obstruct or interfere with the working of the said telephone lines, or intercept any messages transmitted thereon, shall be guilty of a misdemeanor."

The Justice of the Peace, as grounds for his decision, cites the opinion of Judge Grant of the Ontario High Court in the case of Copeland and Adamson et al, 7 C.C.C. (2nd ed.) pg. 393.

After citing the same Article 25, Judge Grant adds:

"The only part of such section which it might be said would be breached by wire-tapping would be the words 'interfere' or 'intercept'. Can it be said that listening in on a telephone conversation is properly described by either of such terms? The Shorter Oxford English Dictionary defines the word 'interfere' as follows:

"To interpose - intersperse; to strike against each other; to come into collision; to exercise reciprocal action so as to increase, diminish or nullify the natural effects of each."

A 2911

It defines the word "intercept" as follows:

"To take or seize by the way or before arrival at a destined place; to stop or interrupt the progress or course of; to interrupt communications or connections with."

I do not believe that wire-tapping which does not impede the conversation between the parties nor impede its progress can form a breach of such section because the material before me does not indicate that the audio surveillance creates any disturbance of the conversation."

In this instance one can determine as did Judge Grant, that the "material" before the Justice of the Peace does not indicate that the audio surveillance by LAVALLEE created any disturbance of the conversation.

The Justice of the Peace rightly decided that there had been no violation of Article 25 of "The Bell Telephone Company of Canada" incorporation act. It follows that he was right in not pursuing the various counts in the complaint charging PATENAUDE and LAVALLEE with having conspired to violate the said Article 25.

Count number 9 of the complaint consisted of a charge of conspiracy to carry out an illegal project forbidden by Article 24 of "The Quebec Telephone and Telegraph Companies Act", 1964, R.S.Q., c. 286.

This Article reads as follows:

"Every person who listens to or acquires knowledge of any conversation or message passing over the lines of a telephone system not address to or intended for such person, and divulges the same or the purport or substance thereof, except when lawfully authorized or directed to do so, shall be liable to the same penalty or imprisonment as are enacted in 23 R.S. 1941, c. 298, s.4."

The Justice of the Peace faced with the evidence that was brought before him, finally concluded that LAVALLEE had, likewise, been authorized or ordered by PATENAUDE to engage in the wire-tapping and therefore LAVALLEE was within the framework of the exceptions stipulated in Article 24; actually, the Justice of the Peace adds:

"If I examine the evidence presented before me I must

A 2912

remind myself that the motive which led PATENAUE to authorize the "VEGAS" operations is easily distinguished and that it is undoubtedly the same that led the legislator to adopt Article 178.12 of the Criminal Code".

As to PATENAUE, his testimony before Judge Mishler shows that he himself had been authorized by the Director General of the Quebec Security Force, his immediate superior, and the Minister of Justice.

Actually, this Article 24 is almost identical to Article 112 of the "Telephone Act" of Ontario which we cited beforehand and which would seem appropriate to cite again:

"112. Every person who, having acquired knowledge of any conversation or message passing over any telephone line not addressed to or intended for such person, divulges the purport or substance of the conversation or message, except when lawfully authorized or directed to do so, is guilty of an offence and on summary conviction is liable to a fine of no more than \$50.00 or to imprisonment for a term of not more than 30 days or to both."

IN the case of Cpeland and Adamson et al cited beforehand, Judge Grant after quoting Article 112 continues:

"It is to be noted by such section that the offence thereby created is the "divulging the purport or substance of the conversation or message, except when lawfully authorized or directed to do so". It follows that one who listens in or acquires knowledge of a conversation or message passing over the telephone lines and refrains from relaying the same to another person would not be guilty of an offence under such section. However, one can safely assume that a police officer who has acquired information in such authorized manner which he determines is helpful in the detection or prevention of a crime will in all cases pass it on to a superior officer and divulge it if he is called as a witness at the trial of the person who made the statement if it is relevant and admissible. The divulging of the message so obtained is not by such section created an offence if the recipient is lawfully authorized or directed to do so.

The policy statement referred to makes it clear that a police officer is only permitted to use audio surveillance when approval in each case is given by the Chief of Police and only then when in the latter's opinion there is reasonable and probable cause to believe that a criminal offence has been or is about to be committed. In deciding whether the police officers or the commission are acting lawfully in following such course, one should have in mind

A 2913

the duties and responsibilities of a board of commissioners of police as well as those of the police force itself.

And further on Judge Grant adds:

"The material before me only indicates that audio surveillance is being used by the police in metropolitan Toronto in the manner prescribed by such policy statements of the Board. This establishes that such equipment is used only with the approval in each case of the Chief of Police granted only when in his opinion, there is reasonable and probable cause to believe that a criminal offence has been or is about to be committed. As the law now stands, such interception by a police officer, in my opinion, does not amount to an offence against s. 112 of the Telephone Act (Ontario) for the reasons set out above."

The charge of conspiracy to violate Article 24 of the Quebec Telephone and Telegraph Companies Act cannot therefore be upheld.

Count number 10 consisted of a charge of conspiracy to carry out an illegal project by illegal means; these illegal means being in violation of Articles 287-1-b and 387 of the Criminal Code, Article 25 of the "Bell Telephone Company of Canada" incorporation act and Article 24 of "The Quebec Telephone and Telegraph Companies Act".

To conclude that these charges cannot be upheld suffice it to say that we have decided above that there has been no violation to the above various provisions.

The examination of the decision of the Justice of the Peace has, therefore, convinced us that he has not committed any of the erroneous determinations on the law that the petitioner accused him of having committed in applying as he did the text of the Criminal Code and the two(2) quoted statutory laws.

The argument of counsel for the petitioner did not convince us either that the Canadian Bill of Rights is applicable to the case at hand.

E. CONCLUSIONS:

The Court is of the opinion that the Justice of the Peace

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has fully exercised his discretion in a discerning manner.

Furthermore, if one were willing to maintain that the Court, after having proven the erroneous determinations on the law, could grant the accessory claims in the petition, the Court is of the opinion that the Justice of the Peace did not commit any of the alleged erroneous determinations on the law that were the grounds for the arguments.

AND THEREFORE, the petition for "mandamus" is denied.

I.C.S.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

----- EVELYN COHEN -----, being duly sworn, says that on the 10th day of July, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a Appellee's Appendix of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Michael Klar, Esq.	John N. Iannuzzi, Esq.
1501 Franklin Ave.	233 Broadway
Mineola, N.Y. 11501	New York, N.Y. 10007

Sworn to before me this
10th day of July, 1975

Olga P. Morgan
OLGA P. MORGAN
Notary Public, State of New York
N.Y. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977

Evelyn Cohen

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19____

United States Attorney,
Attorney for _____

To: _____

Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____ duly entered herein on the ____ day of _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19____

United States Attorney,
Attorney for _____

To: _____

Attorney for _____

Action

No. _____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____
_____ is hereby admitted.

Dated: _____, 19____

Attorney for _____

EXHIBIT
U. S. Dist. Court
S. D. of N. Y.

15
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FANNY MAE COMETT (NINE WITH)
JACQUELINE BYRON FULLER (CHILDREN)

LANCE SMALL
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VERNON THOMAS
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